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No. ———

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In The

Supreme Court of the United States

October Term, 1980

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C. MICHAEL ANDERSON,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

———o———

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QUESTIONS PRESENTED

1. Was the failure to suppress certain evidence obtained through conduct made illegal under the Federal and Nebraska wiretap statutes a violation of the Federal statute and the Supremacy Clause of the United States Constitution?

a. Was the identity of the witness Reams evidence "derived" from the illegal electronic surveillance?

b. Was the connection between Reams and the illegal surveillance attenuated or obtained by some independent source?

2. Did the trial court error in excusing a juror who had expressed reservations about imposing the Death Penalty without first carefully examining that juror to determine if she was irrevocably committed against the Death Penalty, and that that commitment would effect her decision on the question of guilt or innocence?

3. Do the Nebraska Death Penalty Statutes violate the Eighth and Fourteenth Amendments to the Constitution of the United States in that they result in the discriminatory imposition of the Death Penalty?

4. Do the Eighth and Fourteenth Amendments to the Constitution of the United States require states choosing to selectively impose the death penalty to provide for meaningful appellate review of the uniformity of such imposition?

5. Does the Nebraska death penalty statute violate the Eighth and Fourteenth Amendments to the Constitution of the United States in that it fails to provide mean-

ingful review of the facts and circumstances surrounding the imposition of the death penalty as compared to the imposition of a sentence of life imprisonment?

6. Does the Nebraska Death Penalty violate the Sixth Amendment to the Constitution of the United States in that it fails to provide persons sentenced to death with adequate information concerning the circumstances surrounding other homicides, thus denying such persons the effective assistance of counsel?

7. Did the imposition of the Death Penalty in Petitioner's case violate the Eighth and Fourteenth Amendments in that the sentence and the review thereof were the result of arbitrary and unchecked discretion of both the sentencing and reviewing panel?

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No. ———

In The

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October Term, 1980

C. MICHAEL ANDERSON,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered August 15, 1980, Rehearing denied October 7, 1980.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of C. Michael Anderson is reported at 207 Neb. 51, 296 N. W. 2d 440 (1980), attached as Appendix A. Also attached as Appendix B is the order of the trial

court concerning Petitioner's motion to suppress certain evidence.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Article VI, and the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following Statutes of the United States:

18 U. S. C. 2510, 2511, 2515 (App. C).

3. The case involves the following provisions of Nebraska law (Appendix D):

Neb. Rev. Stat. 1943 § 28-401.

Neb. Rev. Stat. 1943 § 29-2519 - 29-2525.

Neb. Rev. Stat. 1943 § 29-2528.

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Neb. Rev. Stat. 1943 § 29-2524.

Neb. Rev. Stat. 1943 § 29-2524.01 - 2524.02.

Neb. Rev. Stat. 1943 § 86-712.

STATEMENT OF THE CASE

Petitioner was arrested on June 16, 1977, and charged with the November, 1975, murder of Ronald Abboud. On October 31, 1977, Petitioner first learned of illegal electronic surveillance of certain telephones by Dennis Whelan, a private investigator (47), and that a transcript of this surveillance was furnished to the State (47). On November 3, 1977, Petitioner moved to suppress certain State evidence as obtained from illegal surveillance and made inadmissible under Nebraska and Federal Law. Hearings were held on that Motion on November 23, 1977, and November 28, 1977, at which time the District Judge found that Petitioner had shown that such illegal surveillance had "tainted" the State's case (148). Hearings were held on November 28, 1977, November 30, 1977, and December 1, 1977, in order to give the State an opportunity to remove this "taint" by showing an independent source for the challenged evidence. On December 28, 1977, the Court ordered all the challenged evidence suppressed as evidence obtained from illegal electronic surveillance (326).

The State appealed this order pursuant to the provisions of Neb. Rev. Stat. 1943 § 29-824. This appeal was heard by Justice McCown, who affirmed the lower court's suppression of all evidence except the testimony of Lon Reams. The Petitioner was tried and convicted of first degree murder and after a determination by a three judge panel, was sentenced to death.

This conviction was appealed to the Nebraska Supreme Court, which Court affirmed the conviction and sentence on August 15, 1980. Petitioner's Motion for Rehearing was denied on October 7, 1980.

Petitioner moved for and was granted additional time to file this Petition on December 6, 1980, giving Petitioner until January 5, 1981.

REASONS FOR GRANTING THE WRIT

I. The Admission into Evidence of the Testimony of the Witness Reams Violated the Federal Wiretap Statute (18 U. S. C. 2510, et seq.) and Article VI of the United States Constitution.

A. The identity and testimony of the Witness Reams came as the result of the exploitation of an illegal wiretap, and should have been suppressed under 18 U. S. C. 2515.

Because of the somewhat unusual nature of this issue, Petitioner believes a brief factual background is necessary.

Following the death of Mr. Ronald Abboud on November 25, 1975, Nebraska Police officials conducted an exhaustive but basically futile investigation of the killing. Dissatisfied with these results, the family of Mr. Abboud hired a private investigator named Whelan to conduct a private investigation. On November 11, 1976, Whelan by his own admission began illegal electronic surveillance of several persons' homes and telephones, including Petitioners'.

Armed with information gained from these illegal wiretaps connecting Petitioner and Lon Reams, Whelan

conceived a plan to coerce Reams into becoming a state's witness. Whelan told Reams that Petitioner and another man, Peter Hochstein, were planning to kill him, and that he, Whelan, had conversations to that effect. This plan worked, as Reams, in fear of his life, agreed to confess. In his confession he implicated Petitioner and Hochstein. Finally, at Petitioner's trial, Reams repeated his statements, which were of course the foundation of the State's case against Petitioner.

At all relevant times in the hearings below, Petitioner claimed that certain evidence, particularly the testimony of Reams, was obtained in violation of 18 U. S. C. § 2511, the Federal Wiretap Statute. He further contended that such evidence, including Reams' testimony, should be excluded under 18 U. S. C. § 2515, as evidence "derived" from the illegal wiretap.

In reversing the trial court's finding that Reams' testimony was "derived" from the illegal wiretap, the Nebraska Supreme Court concluded that knowledge of Reams' identity was gained by independent means, and that his decision to testify "attenuated" any taint of the of the illegal wiretap. This conclusion seems clearly not supported by the facts, and also seriously misapprehends the scope of the prohibition in 18 U. S. C. § 2515.

This Court held in *Brown v. Illinois,* 422 U. S. 590, 603-604 (1975) that no per se rule exists which prevents the testimony of a live witness from being "derived" from an illegal wiretap. Subsequently, in *United States v. Ceccolini,* 435 U. S. 268 (1978), this Court established standards to determine when a sufficient nexus exists between the illegal conduct and the witness' decision to testify. Peti-

tioner contends that an examination of those standards shows a common thread to be whether the illegality was exploited to coerce the testimony. In Petitioner's case it is undisputed that Whelan used the existence of the illegal wiretaps to coerce Reams' testimony, and that without those "conversations" Reams would not have come forward. This kind of exploitation is exactly that which *Ceccolini* condemned, and indeed has been consistently condemned by this Court since *Wong Sun v. United States,* 371 U. S. 471, 487-488 (1963). Lower Federal Courts have reached similar results under facts similar to Petitioner's case involving live witnesses. *See United States v. Scios,* 590 F. 2d 956 (D. C. Cir. 1978); *United States v. Tane,* 329 F. 2d 848 (2nd Cir. 1964); *United States v. Huss,* 482 F. 2d 38 (1973).

The Nebraska Supreme Court, while recognizing the illegality of Whelan's wiretaps, concluded that the State had an independent source for Reams' testimony. The Court stated (Appendix A, p. 28):

> "An examination of the police reports prepared up to the time of Whelan's hiring by the Abboud family disclosed that the police considered Reams as a possible witness to an incriminating statement made by Anderson concerning Abboud. Likewise, in a report dated November 10, 1975, it is shown that Reams was interviewed by the police and his name was again mentioned in a report dated May 20, 1976, as a business partner of Anderson's. Further, a report of June 29, 1976, discloses that the police, while searching for Anderson at his place of business, spoke briefly with Reams."

However, even viewed most favorably to the State, these reports, which constitute the only reference to Reams

before Whelan contacted the County Attorney in April of 1977, disclose only that the police knew Reams existed and in some fashion, was an acquaintance of the Petitioner. This is hardly an independent basis for his testimony. More importantly, by focusing on these reports naming Reams as one who knew the Petitioner, the Nebraska Supreme Court misapplied the law relating to "independent source." It is not necessary that the illegality disclose the identity of the witness. It is enough, as was said in *United States v. Schipani*, 289 F. Supp. 43, 62 (1968):

> "If illegally secured information leads the government to substantially intensify an investigation, all evidence subsequently uncovered has automatically been come at by exploitation of that illegality . . ."

This is certainly the thrust of cases like *Ceccolini, supra,* which properly focus on the degree to which the illegality has been exploited. Petitioner contends that nowhere is that exploitation more evident than in the present case.

Petitioner finally contends that the Nebraska Supreme Court failed to properly implement the clear policy of the Federal Wiretap Statutes. This Court, and lower Federal Courts, have identified that policy as requiring and embodying a broader exclusionary rule than that contained within the Fourth Amendment. In *Gelbard v. United States,* 408 U. S. 41, 45 (1971) this Court discussed in some detail the legislative history of 18 U. S. C. 2515, concluding that Congress was establishing a "fundamental policy" "strictly limiting" the employment and use of electronic surveillance. In *United States v. Calandra,* 414 U. S. 338, 355 (1974) this Court made it clear beyond question that the exclusionary provision of § 2515 was broader in scope

than the Fourth Amendment's rule, and that this was so because of Congress' clear decision to afford special safeguards against the use of wiretaps. *United States v. Manuszak,* 438 F. Supp. 613 (D. C. Pa. 1977) reached the same conclusion.

By permitting Whelan, in cooperation with the County Attorney, to use these illegal wiretaps as a bludgeon to coerce Reams' testimony, the Nebraska Supreme Court rather than affording the special safeguards identified in *Calandra, supra,* clearly frustrated Congressional purpose in § 2515. This Court should grant Petitioner's request and review the decision of the Nebraska Supreme Court in the light of that frustration of an important Congressional policy.

B. The Nebraska Supreme Court's interpretation of the Nebraska and Federal Wiretap Statutes violates the Supremacy Clause of the United States Constitution.

The Nebraska and Federal Wiretap Statutes are virtually identical, particularly 18 U. S. C. 2515 and 86-712 R. R. S. Neb. As the Nebraska Supreme Court recognized in *State v. Kalosseus,* 198 Neb. 404, 253 N. W. 2d 157 (1977), the Federal law is supreme, and the state statute must be at least as strict as the Federal statute. Thus, any interpretation of § 86-712 is per force an interpretation of § 2515. Petitioner contends that the interpretation in his case, in addition to being erroneous as argued above, seriously undermines the Federal policy expressed in the Supremacy Clause and the Federal Wiretap Statute.

As *Gelbard,* supra, and *Calandra,* supra, held, the Federal Wiretap Statute was intended by Congress to severely limit the use of electronic surveillance. To achieve this end § 2515 was adopted to exclude all evidence, direct or indirect, if derived from an illegal wiretap. The legislative history discussed in *Gelbard* at 47-50, 50-51, makes clear the emphasis Congress placed on the curtailment of electronic surveillance, and the central role § 2515 played in achieving that purpose.

The Nebraska Supreme Court clearly paid insufficient deference to the Congressional policy contained in § 2515, as even an overview of Petitioner's case will disclose.

The record makes clear that the police investigation was at a standstill when Whelan began his illegal wiretap. The record is further replete with admissions by Whelan and the County Attorney that neither had any evidence linking Reams to the killing of Mr. Abboud prior to the wiretaps. The record also makes clear that the wiretaps played a central role in coercing Reams' testimony. Finally, the record makes clear that Whelan profited from his illegal wiretaps. Whelan admitted that he was to be paid a $25,000.00 bonus if he proved the guilt of Petitioner, and that his use of illegal wiretaps was designed to do so. Further, Whelan went so far as to secure legal advice as to whether illegally obtained evidence would be admissible in a criminal case. Permitting such evidence to be used seems directly contrary to Congress' purpose in enacting § 2515. As the Senate report said with respect to § 2515:

> ". . . The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." (*Gelbard,* supra, 49-50.)

The Nebraska Supreme Court has certainly not denied the "perpretrator the fruits of his unlawful action", and has thus failed to adequately implement the Federal Wiretap Statute.

II. The Nebraska Death Penalty Statutes Violate the Eighth and Fourteenth Amendments in that they result in an arbitrary, capricious nad discriminatory imposition of the death sentence.

Introduction

In 1972, this Court struck down the capital punishment statutes in all jurisdictions, stating:

> "The imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman v. Georgia*, 408 U. S. 238 (1972).

The primary fault in those statutes was the potential for discriminatory or "lightning-like" imposition of the death penalty. Since no apparent basis existed for determining which convicted accused would live and which die, those statutes failed to provide equal protection. Further, the random quality of the death penalty's imposition constituted cruel and unusual punishment.

Many states, including Nebraska, responded to *Furman* by enacting capital sentencing legislation which attempted to set objective standards for the imposition of the death penalty, for the most part by defining certain factual circumstances which aggravated the magnitude of the crime.

This Court upheld such statutory attempts to curb the random quality of death imposition in *Gregg v. Georgia,* 428 U. S. 153 (1976), *Proffitt v. Florida,* 428 U. S. 242 (1976), and *Jurak v. Texas,* 428 U. S. 262 (1976), while striking down statutory schemes which made the death sentence mandatory upon conviction of certain prescribed crimes. See *Woodson v. North Carolina,* 428 U. S. 280 (1976).

As an important element of these statutory schemes, this Court noted in *Gregg v. Georgia* that:

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme [required the Court to determine] whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Gregg v. Georgia,* 428 U. S. at 198.

The legislation enacted by Nebraska in 1973 did not provide for appellate comparative review in death cases. However, in 1977, the legislature amended the death penalty statutes so as to require that both the sentencing judge or three judge panel (29-2522(3)) and the Supreme Court (29-2521.03) consider the propriety of the sentence when compared to similar cases.

Petitioner contends that notwithstanding the fact that *Gregg v. Georgia* upheld the validity of selective death penalty legislation, important Constitutional questions remain concerning the provisions of such legislation. Chief among those questions are those raised by the present case, i. e., the vague and indefinite controls on the *actual* sentencing authority, and the manner of comparative appellate review. Petitioner seeks the opportunity to show that the Nebraska legislation is deficient in both areas.

A. The death sentence constitutes cruel and unusual punishment because the aggravating and mitigating circumstances are vague and indefinite.

The test for unconstitutional vagueness has been well articulated and recognized as an aspect of due process. "A vague law impermissibly delegates basic policy matters to . . . judges . . . for resolution on an ad hoc and subjective basis with the attendant dangers for arbitrary and discriminatory application." *Graynerd v. City of Rockford,* 408 U. S. 104, 109 (1971). "Men of common intelligence must not be forced to guess at the meaning." *Connelly v. General Construction Company,* 299 U. S. 385 (1926). It is incumbent upon the legislature to set clear guidelines for the trier of fact.

Section 29-2523 contains numerous terms about which reasonable men must guess at a meaning: specifically, 29-2523 "substantial"; 29-2523 (1) (c) "pecuniary gain"; 29-2523 (1) (d) "heinous, atrocious"; 29-2523 (2) (a) "significant history"; 29-2523 (2) (b) "emotional disturbance"; 29-2523 (2) (d) "age." No legislative guidance is given for any of these terms and men of common intelligence can and do guess at their meaning.

In *Gregg v. Georgia,* 428 U. S. 153 (1976), this Court held:

> "A system could have standards so vague that they would fail adequately to channel the sentencing decisions and patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 96 S. Ct. at 2935, fn. 46.

In *State v. White,* — Del. — (1978), the Delaware Supreme Court held as follows:

"As has been demonstrated by *Gregg, Proffitt,* and *Jurek,* the constitutionality of a death penalty

statute rests upon the premise that the sentencing authority's discretion in imposing the death penalty is guided and channeled by clear and objective statutory standards. The defendants assert that the aggravating circumstances which are designated in our Statute simply as 'elderly' and 'defenseless' victims, without further definition, are unconstitutionally broad and vague; that those aggravating circumstances do not provide adequate guidelines to channel the discretion of the sentencing authority sufficiently to constitute the clear and objective statutory standard mandated by *Gregg* and its companion cases. We agree.

"The problem and the answer were well stated by the Supreme Court of Georgia in ruling an aggravating circumstance in its death penalty statute as being unconstitutionally vague in *Arnold v. State,* Ga. Super., 224 S. E. 2d 386, 391 (1976):

> 'Whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny.' "

The requirement of objective standards to guide the sentencing process is made clear in *Woodson v. North Carolina,* 428 U. S. 280, 303 (1976). By contrast, § 29-2519, et seq., contains many vague and subjective standards which do not provide adequate guidelines to channel the decision-making process. Subjective decision-making was the flaw that brought on *Furman v. Georgia, supra,* and the overturning of Nebraska's prior death statutes. The present statutes contain no indication of legislative intent or definitions relative to the numerous terms set forth above. As such, the statutes cannot withstand constitutional scrutiny.

Finally, the Nebraska statute presents exactly the same problems which this Court identified as unconstitu-

tional in *Godfrey v. Georgia,* 446 U. S. — (1980). It is manifest that from *Godfrey* that any Death statute must provide "clear and objective" standards which provide "specific and detailed guidance" making rationally reviewable the death sentence process. Just as the *Godfrey* Court found "outrageously or wantonly vile" to be insufficiently precise, so too should this Court find Nebraska's statute, tailored after Georgia's, insufficiently precise.

This failure to make a rationally reviewable death sentence process is exacerbated in Nebraska because of the limited nature of appellate review. See *infra,* p. 18. As an example, one Nebraska Supreme Court Justice, the Chief Justice, after struggling with the problem of uniform sentencing, stated his view of the statutory standards:

> "(1) If the death penalty is not appropriate in this case, when will it be appropriate, . . . with regard to the first question, let me simply say that I believe I will recognize an appropriate case when I see it." *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18, Krivosha, C. J., dissenting (1979).

It seems clear that other judges, both in sentencing and in review, will experience a similar lack of guidance from the Nebraska Statute. Under *Godfrey, supra,* then, the Nebraska Statute should be struck down.

B. The Nebraska capital sentencing procedure violates the Eighth and Fourteenth Amendments of the United States Constitution because it limits the mitigating factors which may be considered by the sentencing body.

This problem was faced by this Court in *Lockett v. Ohio,* 438 U. S. 586 (1978) and *Bell v. Ohio,* 438 U. S.

637 (1978), wherein the Court held that as a constitutional requirement "the sentencer . . . not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". *Lockett, supra* at 604. The court recognized that there could be "no perfect procedure for deciding . . . to impose death" but held that when the choice is between life and death, it is incompatible with the Eighth and Fourteenth Amendments to limit any independent mitigating factors pertaining to the defendant's character, record, and circumstances of the offense.

The Ohio statute considered by the court in *Lockett* is in many respects similar to the legislation in Nebraska. The mitigating factors in the Ohio statutes are three in number, Ohio Rev. Code Ann. Sec. 2929.03, and are similar to four of the seven mitigating factors set forth in the Nebraska law, specifically 29-2523 (2) (b) (c) (f) (g). Nebraska statutorily sets forth the additional factors of prior criminal activity, age and participation. 29-2523 (2) (a) (d) (f). The Ohio Supreme Court had considered the Ohio law in light of *Proffitt v. Florida,* 428 U. S. 242 (1976) and had held that the statute should be "liberally construed in favor of the accused". *State v. Bell,* 48 Ohio St. 2d 270, 281, 358 N. E. 2d 556, 564 (1976). The court specifically found that age and prior criminal record should be considered in determining mitigating circumstances. *State v. Bell,* supra at 281. The statutory scheme, therefore, as construed by the Supreme Court of Ohio was similar to Nebraska's.

Both the Ohio and Nebraska schemes preclude consideration of relevant factors and a liberal construction by the state court cannot cure this defect. The "mandatory standards" set forth in the Nebraska law limit this consideration and are, therefore, unconstitutional under the Eighth and Fourteenth Amendments of the United States.

C. The statutory procedures governing the imposition of a sentence in a capital case violate the Eighth and Fourteenth Amendments of the United States Constitution in that they are vague, overbroad, confusing and not guided by any ascertainable rules or standards to assure fairness, uniformity and meaningful review.

One of the fundamental concerns of this Court in reviewing the death penalty has been to determine whether the procedure utilized by the states creates some degree of fairness and predictability. The Nebraska statutes do not.

First, Section 29-2520 gives the trial judge several options as to the composition of the sentencing authority. He may make the sentence determination himself, with two other appointed judges, or remove himself. However, nothing in the statute provides any standards to control the judge's decision on this question. This decision is within the uncontrolled discretion of the trial judge. Presumably a trial judge's personal opinion on the death penalty could affect his decision on whether to ask for the aid of two other judges. Numerous other unreviewable factors could also affect his decision. There is no way to determine why some of the current prisoners on death row such as Rust, Holtan, and petitioner were sentenced by a panel of three judges while others such as Stewart and Simants were sentenced by the trial judge. Is the difference to be found in the type of crime, the race of the defendant, the personal opinion and religious beliefs of the trial court? Because there are no standards these questions can never be answered or reviewed.

Second, the procedure is constitutionally defective because it contains no legislative guidance in the situation where the three judge panel is invoked. What vote from the panel is necessary to impose death? Was defendant Rust sentenced by a majority vote and

defendant Holtan by a unanimous vote, or vice versa? If so, why the different treatment for a class of citizens similarly situated? Can the sentencing judge, if unsatisfied with the opinions of the two judges appointed by the Supreme Court, disband the panel and impose sentence himself? This has occurred under the current procedure and there is no statutory guidance controlling such decisions. Assuming that a majority rules, and the statute is silent on this point, there is a serious potential for unfairness here because similarly situated defendants may be treated differently, in violation of the equal protection guarantee of the Fourteenth Amendment. A person in Scottsbluff, Nebraska may be sentenced by a single judge, while a person in Omaha, Nebraska may be sentenced by a panel of three judges. In the case of the three judge panel, assuming the majority rules, at least two judges must vote for the death sentence. The Omaha defendant would then have a better chance to live than the Scottsbluff defendant, since only one vote would be necessary in Scottsbluff. Furthermore, assuming the three judges must have a unanimous decision, the defendant being sentenced by the panel would have three chances to live, whereas the defendant facing a single judge would have only one.

Third, the statutes do not provide for review of that decision in this Court. As this Court pointed out in *Woodson, supra,* at 303, one of *Furman's* basic requirements was that all *actual* discretionary decisions be subject to judicial review. Since the decision to convene a three judge sentencing Court is not subject to such a review, it fails to meet *Furman's* basic requirements and is invalid. See *Woodson v. North Carolina,* 428 U. S. 280 (1976).

Clearly the procedure poses serious constitutional questions in that it lacks legislative guidance and standards to assure fairness, predictability and reviewability. This Court should grant the writ to review those questions.

III. The Nebraska Death Penalty Statutes violate the Sixth, Eighth and Fourteenth Amendments in that they fail to provide for meaningful appellate comparison of the selective imposition of the death penalty.

A. Comparative appellate review of the imposition of the death penalty is required by the Eighth and Fourteenth Amendments.

The purpose of statutory aggravating and mitigating circumstances standards is, of course, to place a control on sentencing discretion. More to the point, such standards tend to force life and death decisions into the open. The absence of such standards led this Court to strike down the North Carolina statute in *Woodson v. North Carolina, supra,* since the life or death decision in that state's mandatory scheme was merely pushed back to the simple verdict of guilty or not guilty.

It is clear, however, that standards by themselves are not sufficient. In *Gregg* and *Proffitt,* this Court noted approvingly that the statutory schemes included appellate review of not only the lower court's application of the statutory standards, but also the statewide practice in their application. Surely, a statute which has no meaningful appellate comparative review cannot pass constitutional muster, since there seems little value in forcing a decision into the open if nobody exists to make certain that those very decisions are being reached uniformly. Petitioner contends that the Nebraska statutory scheme has no such meaningful appellate comparative review, and thus must fall.

B. The Nebraska statutes, as interpreted by the Nebraska Supreme Court, fail to provide adequate comparison of the sentencing treatment of all persons convicted of a homicide, thus resulting in a random, discriminatory imposition of the death penalty.

Sections 29-2521.01 to 2521.04, 29-2522, 29-2524, 29-2524.01, 29-2524.02, Nebraska Statutes, represent Nebraska's response to this Court's concern for proper appellate review. These provisions require the State Supreme Court to review and compare "all criminal homicides" § 29-2521.01 (5) which occurred after April 20, 1973 and determine that "no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." To accomplish this review the legislature requires the Supreme Court to consider the following information from all criminal homicides:

"1. The facts including mitigating and aggravating circumstances.

2. The charges filed.

3. The crime for which the defendant was convicted.

4. The sentence imposed." Sec. 29-2521.01.

This review and comparison is required whether the defendant went to trial, whether he pled guilty, whether there was an appeal, whether the prosecutor reduced the charge, whether a single judge sentenced, or whether a panel of judges sentenced.

There is no legislative definition of "cases with the same or similar circumstances". However, the State Supreme Court, in reviewing and analyzing cases for comparison, is required to examine "the facts including *mitigating and aggravating circumstances*" (emphasis added). A comparison of cases pursuant to these Statutes does not contemplate some cursory "color-matching" of the details of the crime. Rather, the law is intended to eliminate disparity in result by requiring a review of the mitigating and aggravating circumstance in each case and a determination of whether the defendant's sentence is greater than those imposed in the other cases with the same or similar circumstances, and not the same or similar facts. "Circumstances" contemplates aggravating and mitigating circumstances.

The threshold problem in the appellate procedure is that it is not possible for the required information to be gathered because the legislature has not provided the necessary guidance, staff, and funding to accomplish the purposes of the law. In *Gregg,* this Court specifically noted that the Georgia legislature had made special provisions for a staff to enable the court to compile the data relevant to its considerations. *Gregg, supra* at 204. Without this aid the goals cannot be attained and a meaningful comparison cannot be accomplished.

The inability to gather the mandated information leads to a second and more basic problem—the information necessary to carry out a meaningful comparison has not been gathered. A thorough analysis of the information currently on hand has been made, and this analysis shows that the information collected is incomplete, inaccurate, fragmented, unindexed, and in a general state of disarray. Even the State of Nebraska has conceded that the information mandated by these Statutes is "not totally complete." See brief of appellee Page 30, Case 42204. *State v. Harold Lamont Otey.* Without these materials, there is no factual basis for a review and comparison pursuant to the above Statutes.

The crux of the problem is that the materials that the Supreme Court is required to examine do not exist. The Court is required to examine the mitigating and aggravating circumstances of every homicide since April 20, 1973 (§ 29-2519, et seq.). The records necessary to satisfy the legislative mandate do not exist now and never have existed. The typical situation that presents the problem is that in which the crime of First Degree Murder is committed by an individual, the prosecutor reduced the charge to Second Degree Murder in exchange for a guilty plea, and the defendant is sentenced. In that situation, the only records that exist are the transcript, containing the information, judgment, and sentence, the pre-sentence report, and possibly a record

of the factual foundation for a plea to Second Degree Murder. In such a situation there are no transcripts of trial, no findings of fact except the factual foundation for the plea, no findings of aggravating or mitigating circumstances, and no means of determining the aggravating or mitigating circumstances unless the Court reviews police reports, leading to serious evidentiary problems. In such a situation, it is impossible for the defendant to have his case compared, and he is denied the protection of these Statutes.

The Nebraska Supreme Court realized the difficulty of performing such a comparative analysis given the dearth of existing data. In *State v. Williams,* 205 Neb. 56, 287 N.W. 2d 18 (1979), the Court resolved this dilemma in a fashion which aptly illustrates the constitutional problems involved:

"There is language in at least two sections of L.B. 711, Laws of 1978, directing the Supreme Court to review and analyze "all criminal homicides." If the language be interpreted to extend beyond first degree murder convictions, problems relating to the exercise of prosecutorial discretion in homicide cases and the exercise by juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases are all involved. To interpret that language of L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues.

For all these reasons, L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R.S. Supp., 1978, will be construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973." (205 Neb., at 75, 76).

Thus, although it is clear that the life or death decision will often be made by a jury or prosecutor in the

sense that a lesser charge may be brought, or a lesser offense found, the facts and cricumstances of those cases will never be used by the Nebraska Supreme Court to compare the death sentence imposed in the case before it. Yet, these very cases may involve facts and circumstances similar or even worse than those in which the defendant received the death sentence. It is the comparison of the facts and circumstances surrounding the crime which this Court has mandated. The Nebraska Supreme Court, by refusing to look at "all criminal homicides" as the Statute commands, has clearly violated the term and spirit of that mandate.

C. The Nebraska Procedure for Comparative Appellate Review denies petitioner the effective assistance of counsel in that it does not provide petitioner adequate information concerning facts and circumstances of other criminal homicides.

The Nebraska procedure is also constitutionally defective as currently applied, because it denies the petitioner his right to effective assistance of counsel. Without legislative guidance and ascertainable procedures, an attorney can only guess at the actual application of the law to his client. He is unable to argue the facts of other criminal homicides because that information is not available. What information has been gathered is incomplete, inaccurate and unindexed. The State Supreme Court has not revealed what procedures will be followed in view of the fact that the information required for the comparison is not available. While the comparison required by the above Statutes is the duty of the Supreme Court, it is imperative that the defendant, through his attorney, have an opportunity to brief and argue the application of the law to his case, both before the trial court and before the Supreme Court on appeal. Without legislative or judicial guidelines, this preparation is impossible without access to the materials compiled by

the Supreme Court pursuant to the mandate of the legislature. The defendant is thus denied effective assistance of counsel at crucial stages of the proceedings against him.

IV. The imposition of the Death Penalty in Petitioner's case violated the Eighth and Fourteenth Amendments in that the standard of Appellate review announced by the Nebraska Supreme Court was not followed.

Petitioner's case is illustrative of the random, subjective and discretionary nature of the imposition of the Death Penalty in Nebraska.

In *State v. Williams, supra,* the majority gave the following explanation of its basis of appellate review:

> "In all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors." (287 N. W. 2d, 29).

In Petitioner's case only one separate and distinct aggravating circumstance was found. Yet, writing for the majority, Chief Justice Krivosha had no difficulty recognizing this case as an appropriate case for imposition of the death penalty. Clearly the Court found the aggravating circumstances present in Petitioner's case to carry greater weight than some others, Of course, this highlights the problem with the Nebraska statute. No doubt other judges will believe other aggravating circumstances to be similarly weighted. Whether any given defendant gets sentenced to life or death will thus depend not on the statutory aggravating circumstances, but whether the sentencing authority knows a death case when it sees it. This was exactly the practice condemned in all its guises in *Furman,* supra, and *Woodson,* supra, and should be condemned here as well.

V. The trial court improperly excluded a juror expressing reservations concerning the Death Penalty without first carefully examining that juror to determine if she was irrevocably committed against the Death Penalty, and would be thus swayed in her decision on guilt or innocence.

The record of this case clearly demonstrates that a member of the jury panel was excluded during voir dire for expressing conscientious scruples concerning the imposition of the death penalty. The record does not show that the trial court conducted a careful examination in accordance with the mandates of *Witherspoon v. Illinois,* supra, and *Davis v. Georgia,* 429 U. S. 122 (1976).

The subsequent imposition of the death penalty must be set aside. *Adams v. Washington,* 403 U. S. 947 (1971); *Harris v. Texas,* 403 U. S. 947 (1971); *Wigglesworth v. Ohio,* 403 U. S. 947 (1971).

CONCLUSION

For all of these reasons, Petitioner respectfully urges this Court to grant his Petition for a Writ of Certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

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APPENDIX A

STATE V. ANDERSON and HOCHSTEIN
NOS. 42301, 42302 - filed August 15, 1980.

1. Wiretapping: Witnesses: Evidence. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible.

2. ——:——:——. The use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of a statute forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein.

3. Trials: Joinder: Appeal and Error. The ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.

4. Trials: Joinder: Burden of Proof. It is the duty of one challeging a joint trial to demonstrate how and in what manner he is prejudiced.

5. Juries. One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause.

6. Polygraph Tests: Prejudicial Error. The mere mention of the word "polygraph" absent more, does not constitute prejudicial error.

7. Prosecutor Misconduct: Appeal and Error. A party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict.

8. Venue: Juries: Appeal and Error. A motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and in the absence of an abuse of discretion, its ruling will not be disturbed on appeal.

9. Criminal Defendants: Prejudicial Error. An accused has the right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings.

10. Motions to Suppress: Appeal and Error. The procedure for appealing from an order entered, under either the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979) or Neb. Rev. Stat. § 86-705 (12) (Reissue 1976), shall be in accordance with § 29-824 and shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the full Nebraska Supreme Court, the defendant may challenge the correctness of the order by the single judge by preserving the question in the motion for new trial, as prescribed in § 29-824.

11. Death Penalty: Constitutional Law. The death penalty, when properly imposed by a state, does not vio-

late either the eighth or fourteenth amendments of the United States Constitution or Neb. Const. art. 1, § 9.

12. Death Penalty: Constitutional Law: Juries. Jury sentencing in a capital case is not constitutionally required.

Heard before Krivosha, C. J., Boslaugh, Brodkey, and White, JJ., and Colwell and Fahrnbruch, District Judges.

KRIVOSHA, C. J.

The instant appeals, though involving two separate cases, result from a consolidated trial arising out of a common crime and involve essentially identical issues. For that reason, we have elected to, likewise, consolidate the two cases for purposes of our decision.

On July 1, 1977, appellants Peter Hochstein (Hochstein) and C. Michael Anderson (Anderson) were separately charged by information in the county court of Douglas County, Nebraska, with first degree murder in the death of Ronald J. Abboud (Abboud). Hochstein and Anderson were bound over to the District Court for Douglas County, Nebraska, which, after consolidating the matters, heard and ruled on numerous pretrial motions, some of which are involved in this appeal. After trial, both appellants were found guilty as charged and sentenced by a three-judge panel to be executed. Hochstein and Anderson both appeal from the conviction and sentence, assigning a number of errors which we shall individually discuss hereafter. We have, however, carefully and meticulously reviewed this matter and conclude that it is, in all respects, correct. We, therefore, affirm both the conviction and the sentence.

The body of Abboud was discovered on November 2, 1975, along a creek bank in a rural area west of Omaha,

Nebraska. Abboud had been reported missing and had last been seen on October 29, 1975. The investigation, including the autopsy conducted on the body of Abboud, disclosed that Abboud had been shot in the head, back, and neck with a .22 caliber pistol. Soon after the body was found, the investigation led police to suspect both Hochstein and Anderson as being involved in the killing. Anderson had been employed by Abboud's company, Commercial Realty, for several years and Hochstein was a close friend of Anderson. Despite the suspicions, however, the authorities had been unable to effect an arrest of any suspect by June of 1976.

At that time, the Abboud family hired a private detective by the name of Dennis Whelan (Whelan). Whelan was specifically instructed by the Abboud family that he was to establish the guilt or innocence of Anderson and Hochstein. Likewise, at the time of the hiring by the Abboud family, Whelan was further made aware of a Lon Reams (Reams) who was known to have a business and social relationship with Anderson.

An examination of the police reports prepared up to the time of Whelan's hiring by the Abboud family disclosed that the police considered Reams as a possible witness to an incriminating statement made by Anderson concerning Abboud. Likewise, in a report dated November 10, 1975, it is shown that Reams was interviewed by the police and his name was again mentioned in a report dated May 20, 1976, as a business partner of Anderson's. Further, a report of June 29, 1976, discloses that the police, while searching for Anderson at his place of business, spoke briefly with Reams.

Whelan proceeded to investigate the murder through the means of interviews, visual surveillance, record checking, and the reading of police reports which had been provided to him by an unknown source.

Beginning on November 12, 1976, Whelan began installing and monitoring electronic surveillance devices in the apartments of Anderson and Hochstein. This continued until April 21, 1977.

In December of 1976, Whelan learned that a woman he knew, Mila Dickman (Dickman), was employed by Bruce Miller and Anderson and that she was closely associated with Reams. Whelan interviewed her and told her of his suspicions that Reams, Anderson, and Hochstein were the persons who had killed Abboud. Dickman agreed to aid Whelan by passing on any information that she might learn concerning the three. Whelan and Dickman subsequently met on frequent occasions and Dickman told Whelan that Reams felt that he was being edged out of his association with Anderson and Hochstein.

On April 15, 1977, Whelan met with Samuel Cooper (Cooper) of the Douglas County Attorney's office. At this meeting, which lasted approximately 3 hours, Whelan informed Cooper of his own investigation, including the illegal wiretaps, and played portions of at least one of the taped conversations for Cooper. He also told Cooper that he felt Reams was directly involved in the Abboud homicide, along with Anderson and Hochstein. Cooper later testified at a hearing on a motion to suppress that Whelan's information concerning Reams gave him nothing more than he already had.

During their meeting on April 15, 1977, Whelan was specifically instructed by Cooper that he was to terminate his illegal wiretapping. Cooper furthermore implied to Whelan that, if Reams would talk to Cooper, that Cooper would consider granting Reams immunity from prosecution.

On June 7, 1977, Reams was interviewed by Cooper and Douglas County Attorney Donald Knowles. Reams denied having any knowledge of or involvement in the Abboud murder. Whelan was again contacted by Cooper and asked to do whatever he could to assure Reams that, if he was not directly involved in the murder, but had knowledge of it, he would be treated fairly by the county attorney's office.

On June 13, 1977, Whelan talked to Reams in the presence of Dickman and advised Reams to tell the county attorney what he knew about the murder. Whelan told Reams that he had "conversations" which indicated Anderson and Hochstein were planning to do away with Reams. Whelan later testified that he tried to play on Reams' paranoia and that he told him "the case was made and that his only chance . . . was to make a deal. . . . I tried to bluff him, I tried to scare him." The record does not disclose that any such conversation between Hochstein and Anderson actually occurred, but rather established that Whelan did not hear and record such conversations between Hochstein and Anderson and, in fact, was bluffing Reams. Reams told Whelan that he would think it over and contact an attorney.

On June 15, 1977, Reams and Whelan met again and Reams told Whelan that he had contacted an attorney and

asked him to get in touch with Cooper. Also on June 15, 1977, when Whelan and Reams met again, Reams admitted that he was involved in the murder. That afternoon, he and his attorney met with Cooper and Reams gave a complete statement about the murder, naming Hochstein and Anderson as the persons responsible and acknowledging the part he, himself, had played in the murder. Reams' testimony at the trial was central in obtaining the guilty verdicts.

Reams' testimony at trial disclosed that he and Anderson had met early in 1975. In May of that year, Anderson began to tell Reams of his negative feelings towards his employer, Abboud, and he began to speak more often about his dislike for Abboud due to Abboud's alleged unfair business dealings and intimated that he would like to do something about it.

About a week before the murder, Anderson first revealed an intention to take some action toward Abboud. Anderson, Hochstein, and Reams had gathered at Reams' house to drink beer and the conversation turned to Abboud. The three began discussing the possible means of eliminating Abboud, going from hiring local or outside "hit men," to the use of a knife, to the use of explosives. Again, just a few days later, the three met at Reams' house and began to seriously plan out the murder. Hochstein, after fixing a malfunctioning Ruger pistol belonging to Reams, suggested that he might "do it," meaning murder Abboud, because he needed money. He mentioned a price of $1,500 which Anderson agreed upon as fair. The parties then planned out how Hochstein could get Abboud off alone. They decided that Hochstein should play the part of a prospective purchaser of real estate

to whom Abboud would be asked to show some property listed with his company. Hochstein was to use the name "Jim Parker" in his dealings with Abboud. Anderson knew of a piece of agricultural property listed with Commercial Realty located at about 168th and Q Streets which might be "a good spot." They all then got into Hochstein's car and drove out to the property in question. Although they remained in the car, Anderson described the lay of the land for them. Hochstein kept the Ruger pistol after this meeting.

Reams further testified that the "hit date" was originally scheduled to be Tuesday, October 28, 1975. The previous day, Anderson and Reams had gone to the bank to borrow the $1,500 necessary to pay Hochstein. The money was given to Hochstein that afternoon.

The plan was for Hochstein to arrange an appointment with Abboud to see the real estate listed by Commercial Realty. Once they were alone on the property, the murder was to take place. Hochstein was then to call Reams who, in turn, would call and inform Anderson. Then Reams was to go and pick up Hochstein. Hochstein arranged the appointment with Abboud for Tuesday afternoon, October 28, 1975. However, Reams later received a telephone call from Hochstein, presumably from Abboud's car telephone, identifying himself as "Jim Parker." Hochstein informed Reams that he was with a few gentlemen. Later that day, he again called, this time from the Smuggler's Inn, a restaurant, where he had been left by Abboud. Reams picked up Anderson and went to pick up Hochstein, who told him that he hadn't been able to carry out the plan because there had been two other people

in the car. However, Hochstein was going to call Abboud to set up another meeting for the next day.

The next morning, October 29, 1975, Hochstein again called Abboud and set up an appointment. The next contact Reams had with Hochstein was a telephone call at about 4 or 4:30 that afternoon. Hochstein simply said, "It's done," and told Reams to pick him up at Westroads, a shopping center located in Omaha. Reams called Anderson and then went out to pick up Hochstein. The body of Abboud was found 3 days later.

After Hochstein and Anderson were bound over to the District Court for Douglas County, Nebraska, they moved to suppress all evidence obtained a a result of the illegal electronic surveillance undertaken by Whelan. After a hearing on the matter, the Honorable John T. Grant ordered the suppression of a substantial portion of the State's evidence, including the testimony of Lon Reams.

Pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), the State appealed the decision to a single judge of the Nebraska Supreme Court who, on April 12, 1978, rendered a judgment and opinion affirming the District Court's order except as to the testimony of Lon Reams. As to the Reams' testimony, the single judge held that the evidence was admissible.

Thereafter, the case proceeded to trial, after which the jury returned a verdict of guilty of murder in the first degree against each appellant. A three-judge panel was appointed as prescribed by statute and, after hearing, the panel entered its order of sentence imposing the death penalty upon each appellant. It is from these verdicts

and sentences that the appellants appeal, claiming a number of errors.

The first, and perhaps the most serious, assignment of error raised by appellants has to do with the testimony of Lon Reams. Specifically, the appellants maintain that it was error not to suppress the testimony of Reams. However, our examination of the evidence and the law in that regard leads us to the conclusion that it was not error to permit Reams to testify. We reach our decision both because his identity was not made known by reason of an illegal wiretap and because his decision to testify was voluntary, thereby attenuating the taint, if any, of the illegal wiretap.

Appellants maintain that Reams' testimony was, indeed, the "fruit of the poisonous tree" obtained by Whelan and, as such, should not have been permitted. Their argument is based upon the provisions of Neb. Rev. Stat. § 86-712 (Reissue 1976) which is essentially identical to Title 18 U. S. C. § 2515 (1976) and reads, in part, as follows: "No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of Chapter 86, article 7."

It is argued to us that the provisions of the above-cited statute should apply without regard to whether the illegal interception is made by a private citizen or a government agent. There appear to be no cases directly addressing the question of what happens when the wiretap is conducted by a private citizen, as opposed to a government agent. However, the facts of this case do not re-

quire us to decide that issue at this time. Regardless of who instituted the illegal wiretaps in the instant case, the only questions under either the cited act or the fourth amendment necessary for our decision are (1) Was the existence of Reams as a potential witness known by means other than the illegal wiretap? and (2) Did Reams voluntarily agree to testify? If the answer to either of those questions is in the affirmative, then all of the argument concerning the meaning and effect of § 86-712 is of no moment.

In all of the cases cited to us by appellants in which the live witness' testimony was suppressed, the existence of the witness was first brought to the government's attention by reason of the illegal wiretap or search. The evidence in each of those cases clearly points out that, but for the illegal activity conducted by the government, the existence of the witness would never have been known to the government. *United States v. Tane,* 329 F. 2d 848 (2d Cir. 1964); *United States v. Huss,* 482 F. 2d 38 (2d Cir. 1973); *Commonwealth v. Cephas,* 447 Pa. 500, 291 A. 2d 106 (1972); *United States v. Cruz,* 581 F. 2d 535 (5th Cir. 1978). The prohibition against using the live witness is not, however, based upon a "per se" rule. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible. In *Nardone v. United States,* 308 U. S. 338, 341 (1939), the United States Supreme Court, in reviewing the prohibition against using improperly obtained testimony under § 605 of the Federal Communications Act

of 1934, 47 U. S. C. § 605 (1934), speaking through Mr. Justice Frankfurter, said:

"Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. [Citation omitted.]

"In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that the wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

In the *Tane* case, relied upon by appellants, unlike the instant case, the identity of the witness was derived from the wiretap. The witness was unwilling to testify or even admit to making any unlawful payments until possession

of tapes of a certain conversation was revealed by the assistant district attorney. In the instant case, Reams' identity was not derived from any wiretap and his willingness to testify as will be discussed in a moment, was not dependent upon any wiretap which implicated Reams in the crime.

Appellants have further cited to us the case of *United States v. Marder,* 474 F. 2d 1192 (5th Cir. 1973), in support of their position that Reams' testimony should have been suppressed as a fruit of the poisonous tree. The *Marder* decision, however, stands for a contrary rule. The court in *Marder* said:

"We do not adopt a per se rule which would *ipso facto* preclude the utilization of all testimony of a witness identified as a consequence of an illegal search. Many extenuating circumstances may affect the appropriateness of the introduction of such testimony, which would not pertain to an inanimate object seized by an illegal search.

. . . .

". . . Several factors should be considered in deciding whether the attenuation rule is applicable to 'live testimony.' The unpredictability of the human will, which is necessarily involved in the use of a witness to prove essential elements of a crime, forecloses the adoption of any rigid rules. 'Thus, each case must be examined on an ad hoc basis, considering the particular facts presented, rather than on any sweeping general concept of "live testimony" as such.' [Citation omitted.]" *Id.* at 1196. See, also, *United States v. Holsey,* 437 F. 2d 250 (10th Cir. 1970); *Smith v. United States,* 324 F. 2d 879 (D. C. Cir. 1963).

The record clearly establishes that the witness Reams was not unknown to either Whelan or the State prior to the illegal wiretaps. When Whelan was first hired by the Abboud family, he was specially advised that Reams may be a suspect or at least a party with information. The police, though perhaps not as vigorously as they might, had pursued Reams and made inquiry concerning his having heard Anderson make some threatening statements concerning Abboud. Whelan arranged a contact with Mila Dickman who, in turn, kept Whelan advised about the fact that Reams was getting nervous and felt he was being "edged out" of his association with Anderson and Hochstein. There is no evidence in the record to support the position that, but for the illegal wiretap, either the existence of Reams or the fact that he might testify would have been unknown.

The record establishes the fact that nothing heard during the illegal wiretap led the State to Reams. Exhibit 43 best ilustrates this fact. Exhibit 43 is a report made by Whelan to the Abboud family and reads, in part:

"Monday, 6-13-77

"Talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but knows what happened. We decided that Mila and I should talk with Lon and make a deal.

". . . Lon had been at her home all week-end and was acting very nervous, upset over something. Plan decided on: Mila is to talk with Reams this afternoon and tell him of her involvement with me and that the case is coming down with Reams as a conspirator; he will be charged with murder. Also, it is now known that Anderson, Pete and

Leo are going to kill Lon. Mila also believed this and was placed in the middle. Both had to make a decision—Reams arrested or Reams killed. Mila agreed to talk with Lon and go for the confession. She agreed to give Lon enough information so that he would believe that he had no out and that Cooper had enought for the arrest."

Of course, none of the "facts" to be related to Reams were true and were not obtained as a result of any illegal wiretap.

We, therefore, conclude that the identity of Reams was made known to the State by independent means and was not the sole result of an illegal wiretap. It was, therefore, not the fruit of a poisonous tree and it was not error for the court to permit Reams' live testimony to be admitted into evidence.

Having, therefore, answered the first question posed at the outset of this discussion in the affirmative, we now turn to the second question. That is, regardless of the illegal wiretaps, did Reams voluntarily come forward and offer to testify so as to attenuate any taint, if such a taint existed? Again, we believe that this question must be answered in the affirmative.

When Reams was first contacted by the county attorney's office, he denied any knowledge of the crimes and refused to talk to Cooper.

It was only after Whelan told him that his life was in danger and that he should cooperate in return for immunity, that he sought out counsel. After he consulted with counsel of his choice, he apparently came to the conclusion that he was being offered a chance of a lifetime

and came forward and offered to testify in return for the promise of immunity. To be sure, Whelan had no evidence that Reams was to be killed and was lying to Reams. In his testimony, Whelan stated as follows:

"Q. Did you obtain any information with respect to Mr. Reams?

"A. I don't think so, no.

"Q. Did you reveal any of the conversations off that wire tap to Mr. Reams?

"A. No, sir.

"Q. Did you ever at any time play any of the conversations to Mr. Reams?

"A. Never.

"Q. And you testified that you implied to Mila and to Lon Reams that he was in danger?

"A. I implied that, yes, to Lon and Mila.

"Q. In danger from what?

"A. In danger from his associates.

"Q. Did you have any factual basis for that?

"A. No, sir. All I was trying to do was play on his own paranoia at the time. . . . I would have to say that a lot of it was made up. I was bluffing him. . . .

"Q. Now, you testified that I [Cooper] didn't authorize you to grant immunity to anybody. That is correct, isn't it?

"A. That is correct.

"Q. But it was also clear from our conversation that that was the intent if Mr. Reams was to come forward, wasn't it?

"A. That was what I drew from it.

"Q. And that's basically what you told Mr. Reams, wasn't it?

"A. I told him that I thought he should get a lawyer and, through the lawyer, make a deal for immunity."

Reams could easily have asked to hear the alleged tapes. Such a request would have quickly disclosed that the tapes did not exist. Apparently, neither the threats nor the tapes were a moving factor in Reams' decision to testify. On advice of counsel, the offer of immunity undoubtedly did more than anything else to cause Reams to come forward. Reams had every opportunity to reflect on the entire matter and to consult with his attorney before voluntarily offering to testify.

The fact that Whelan may have overheard a conversation between Hochstein and Anderson in which Reams was mentioned did not affect the State's right to use the information against Reams. In *Goldstein v. United States*, 316 U. S. 114 (1942), it was held that the use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of the provisions of § 605 of the Federal Communications Act, 47 U. S. C. § 605 (1976), forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein.

Likewise, in the case of *Unitd States v. Scotten,* 428 F. Supp. 256 (D. Nev. 1976), the United States District Court for the District of Nevada held that, although evidence seized at an illegal search of a warehouse had been suppressed as to the defendant because of his proprietary interest in the premises, testimony of an unindicted coconspirator who became a government witness would not be suppressed with respect to the defendant although the seized evidence which was useable against the defendant was a substantial factor leading to the decision of the unindicted coconspirator to cooperate with the government. The court found that the decision of the witness to turn state's evidence was an independent act of free will which was not affected or obtained in any respect by wrongful exploitation of evidence seized or obtained in violation of his right of privacy.

Reams had much to gain by agreeing to testify in return for the offer of immunity. To suggest that his offer to testify was not voluntary under the facts is to attempt to ignore the facts as detailed earlier in this opinion. It was, indeed, voluntary and most beneficial to Reams. We are, therefore, unable to agree with appellants that Reams' live, in-court, testimony should have been suppressed. It was clearly voluntarily and properly admissible, though admittedly damaging to the appellants.

Having so disposed of that issue, we shall now proceed to examine the remainder of the issues raised by appellants. Appellant Hochstein claims that the trial court erred in failing to grant his oral motion for severance. The cases against Hochstein and Anderson, filed separately, were ordered consolidated by the trial court on

September 12, 1977. We have frequently held that the ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. *State v. Bazer,* 189 Neb. 711, 204 N. W. 2d 799 (1973). The same rule applies with regard to a motion to sever. See *State v. Cook,* 182 Neb. 684, 157 N. W. 2d 151 (1968). Furthermore, we have held that it is the duty of one challenging a joint trial to demonstrate how and in what manner he was prejudiced. See Neb. Rev. Stat. § 29-2002 (4) (Reissue 1979) and *State v. Rice,* 188 Neb. 728, 199 N. W. 2d 480 (1972). Hochstein made no such showing at the time of the oral motion and an examination of the record fails to disclose any such prejudice. We find no evidence that the trial court abused its discretion in granting the State's motion for consolidation and denying Hochstein's motion to sever. The assignment of error is overruled.

Appellants next contend that the trial court erred in not granting appellants' request for a mistrial based upon the prosecution's "death qualifying" the jury panel. Unfortunately, the examination of the jury panel was not recorded. However, the court reconstructed what took place immediately after the incident in question during an in camera discussion. It appears that the jury panel was advised that the death penalty was a possible sentence which could be imposed for the crimes charged in the instant cases. Thereafter, a panel member was asked if she believed in the death penalty. She replied that she did not and further advised that her view opposing the death penalty might color her judgment in reaching a verdict of guilty or not guilty. The court proceeded then to further question the panel member and determined that her

feelings about the death penalty would, indeed, influence her determination of the factual question of guilt or innocence. She was, therefore, excused from the panel. Appellants argue that this exclusion amounted to "death qualifying" the jury, contrary to the mandate of the United States Supreme Court in the case of *Witherspoon v. Illinois,* 391 U. S. 510 (1968). We believe, however, that appellants have misconstrued the holding in *Witherspoon.* The *Witherspoon* case held that: "sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venireman for cause simply because they voiced general objections to the death panalty . . ." *Id.* at 522. In so holding, however, the Court, in *Witherspoon,* specifically stated that the issue decided did not concern the exclusion of prospective jurors who stated that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. The exclusion of the panel member in the instant case was not based upon the panel member's refusal to impose the death penalty, but upon her admission that, because she objected to the death penalty, she could not fairly and impartially determine the guilt or innocence of the appellants, even though she would not be called upon to impose the sentence. In *State v. Kirby,* 185 Neb. 240, 175 N. W. 2d 87 (1970), we held that one who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause. The trial court correctly perceived that to be the case and properly excused the juror. Such assignment of error must be overruled.

Appellants next contend that the trial court erred in overruling their motion for mistrial after Reams men-

tioned the word "polygraph" during redirect examination. Counsel for both Anderson and Hochstein immediately objected and, during an in camera hearing, moved for a mistrial on the basis that the witness Reams had mentioned the word "polygraph" in the presence of the jury. The testimony did not indicate whether Reams had ever taken a polygraph test or, if so, what results were obtained.

The trial court overruled the motion for mistrial but, before proceeding further with the trial, instructed the jury, in part, as follows: "The jury is instructed to pay no attention to either the question or the answer as the matters made reference to have no place in a court of law. There is no factual matter at all in this case in any regard to the subject of polygraph. There will be no further reference to that subject in the trial." While it is true that the results of a polygraph test are not admissible in evidence, *State v. Temple,* 192 Neb. 442, 222 N. W. 2d 356 (1974), in the instant case, there was no testimony concerning the results of a polygraph test. The mere mention of the word "polygraph," absent more, does not constitute prejudicial error. Appellants have failed to disclose how or in what manner the use of the word "polygraph" was prejudicial under the circumstances and we are unable to see how the appellants could have been prejudiced by the mention of the word "polygraph." The assigned error must be overruled.

Anderson and Hochstein next maintain that the trial court erred in failing to grant their request for a mistrial based upon the State's alleged improper highlighting of appellants' failure to testify. Both appellants maintain that the State made certain remarks during the voir dire

examination which, when taken together with a later newspaper article, denied to the appellants a fair trial. The record discloses, however, that neither appellant objected to remarks made by the prosecution at the time they were made, nor did either defendant move for a mistrial based upon those remarks. We have frequently held that a party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict. *Vacanti v. Montes,* 180 Neb. 232, 142 N.W.2d 318 (1966). In addition, however, an examination of the alleged statements fails to disclose how or in what manner they were prejudicial or improper. With regard to the matter of the newspaper article, likewise, the claim is without merit. An article which appeared in the Omaha World Herald the morning before the case was submitted to the jury for its consideration read, in part, as follows: "By pleading innocent, Hochstein and Anderson have denied involvement in the crime, but their failure to testify meant jurors never heard either deny the charges." Appellants' claim in this regard fails on at least two grounds. In the first instance, there is no evidence in the record to indicate that the jury failed to follow the admonition given by the trial court not to read newspaper accounts and, in fact, read the article, but, more importantly, there is nothing in the statement itself which could, in any manner, be said to have prejudiced the appellants. The article recited the truth simply and factually. There is no evidence of prejudice. The assignment is overruled.

Hochstein and Anderson next maintain the trial court committed error in failing, on the court's own motion, to

change the venue of the trial and to order the jury sequestered during trial. The record discloses that appellants requested neither action from the court. As with the earlier errors assigned, appellants have failed to disclose how or in what manner they were prejudiced by reason of the trial court's failure to change the location of the trial or sequester the jury on its own motion. We have previously held that a motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal. *State v. Simpson,* 200 Neb. 823, 265 N. W. 2d 681 (1978); *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18 (1979). There is no evidence that the failure of the court to act on its own motion, if such a duty even existed, was an abuse of discretion. The assignment of error must be overruled.

Anderson and Hochstein next contend that the trial court failed to assure them the right to a fair trial because two pretrial hearings were held in their absence. The first hearing concerned a motion by Anderson to dismiss. While the record shows that Anderson was not present at this hearing, he was represented by counsel. Further, the record reveals no request by Anderson's counsel that Anderson be present or any objection to proceeding without Anderson's being present. With regard to the second hearing, it appears it was upon a motion made by Anderson's counsel as to whether an evidentiary hearing should be held to consider the admissibility of allegedly tainted evidence. At neither or these hearings was evidence adduced. They were held simply to give Anderson's and Hochstein's attorneys an opportunity to argue the law to the court. The general rule is that an accused has the right to be present

at all stages of the trial when his absence might frustrate the fairness of the proceedings. *State v. Bear Runner,* 198 Neb. 368, 252 N. W. 2d 638 (1977); *Faretta v. California,* 422 U. S. 806 (1975). We fail to see how Anderson's or Hochstein's absence at a time when their attorneys were arguing matters of law to the court could frustrate the fairness of the proceedings. Likewise, neither appellant is able to point out to us how his absence frustrated the fairness of the proceedings. We have earlier held that a defendant has no constitutional right to be present at the hearing on a motion for a new trial. *State v. Wells,* 197 Neb. 584, 249 N. W. 2d 904 (1977). We fail to see how the appellants' absence from these two hearings should be treated any differently. The assignment of error must be overruled.

Appellants' next assignment of error is that the trial court erred in failing to give appellants' requested instruction concerning "reasonable doubt." The record reflects that the trial court, over objection by appellants, instructed the jury on "reasonable doubt" by following the pattern jury instruction NJI 14.08. Appellants maintain that the instruction as approved in NJI is confusing, contradictory, and a misstatement of the traditional understanding of "reasonable doubt." Our examination of the instruction fails to reveal that it does not properly reflect the rule in Nebraska concerning reasonable doubt. The NJI on "reasonable doubt" has been frequently approved by this court. *State v. Rice, supra; Haswell v. State,* 167 Neb. 169, 92 N. W. 2d 161 (1958). Moreover, when all of the instructions given by the court are taken together, they are not, in any manner, misleading and they adequately cover the issues raised. There is, therefore, no prejudi-

cial error. *State v. Bear Runner, supra; State v. Pratt,* 197 Neb. 390, 249 N. W. 2d 500 (1977).

Appellants further assign as error the manner in which the State appealed the trial court's suppression of certain of the evidence prior to trial. In essence, appellants argue that it was error to permit the interlocutory appeal to be heard by a single judge as provided for in § 29-824 and that, instead, the appeal was required, under the law, to be heard by the entire court sitting en banc. Section 29-824 specifically provides, in part, as follows: "*In addition to any other right to appeal,* the state shall have the right to appeal from an order granting a motion . . . to suppress evidence in the manner herein provided." (Emphasis supplied.) The manner provided for in the quoted section is reviewed by a single judge of the Nebraska Supreme Court at chambers. The appellants maintain that, under the provisions of Neb. Rev. Stat. § 86-705(12) (Reissue 1976), the State was required to appeal to the entire court and we should now remand the matter for a full court hearing. There are, however, several defects in that argument. In the first place, we have now reviewed the entire matter while sitting en banc. No purpose could be served in ordering a new trial so that the State could again appeal to this court en banc. We have disposed of the entire matter at this time. Furthermore, § 86-705(12) reads, in part, as follows: "*In addition to any other right to appeal,* the Attorney General . . . shall have the right to appeal from an order granting a motion to suppress made under subsection (11) of this section. . . ." (Emphasis supplied.) Section 86-705(12) makes it clear that the right to appeal at the specific time is not exclusive, but is in addition to any other right of

appeal. Section 29-824 and related applicable sections leave no question that they are all a part of "search and seizure" and quite clearly authorize the State to appeal to a single judge of the Nebraska Supreme Court prior to trial in order to permit the question of the suppression of evidence to be tested quickly before trial. The entire court is afforded a subsequent opportunity to review the issue when the appeal on the merits is brought to the entire court. There is nothing vague or unclear about such a procedure.

No procedure for the manner of appeal is prescribed in § 86-705(12). We see little reason why an interlocutory appeal concerning the suppression of evidence should be heard by a single judge of this court sitting at chambers if brought pursuant to § 29-824, but by the entire court sitting en banc if brought under the provisions of § 86-205(12). We, therefore, hold that the procedure for appealing from the provisions of either § 29-824 or § 86-705(12) shall be in accordance with § 29-824 and such appeal shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the Nebraska Supreme Court, the defendant may again challenge the correctness of the order by a single judge of the Supreme Court by preserving the question in the motion for new trial as prescribed in § 29-824. We, therefore, overrule the appellants' assignment of error in that regard.

Appellants' last claim goes to the imposition of the death penalty and is presented to us in several parts, some of which have already been answered by this court. The first claim is that the Nebraska death penalty consti-

tutes cruel and unusual punishment, violating the eighth and fourteenth amendments to the United States Constitution and Neb. Const. art. 1, § 9. We may dispose of that claim based upon several recent decisions by both this court and the Supreme Court of the United States. Each has held that the death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendment of the United States Constitution or Neb. Const. art. 1, § 9. See, *State v. Stewart,* 197 Neb. 497, 250 N. W. 2d 849 (1977); *State v. Rust,* 197 Neb. 528, 250 N. W. 2d 867 (1977); *State v. Holtan,* 197 Neb. 544, 250 N. W. 2d 876 (1977); *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18 (1979); *State v. Otey,* 205 Neb. 90, 287 N. W. 2d 36 (1979); *Gregg v. Georgia,* 428 U. S. 153 (1976); *Proffitt v. Florida,* 428 U. S. 242 (1976); *Woodson v. North Carolina,* 428 U. S. 280 (1976).

Appellants further maintain that the Nebraska death penalty, imposed by the court rather than a jury, violates the sixth and fourteenth amendments of the United States Constitution and Neb. Const. art. 1, § 11, in that it denies the accused the right to trial by jury and the right to confront his accuser. As we noted in *State v. Simants,* 197 Neb. 549, 558, 250 N. W. 2d 881, 887 (1977): "The United States Supreme Court, in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), has held that jury sentencing in a capital case is not constitutionally required."

Likewise, the United States Supreme Court, in *Gregg v. Georgia, supra,* addressed the question of evidentiary formalism under the bifurcated system of capital sentencing. It is clear from the *Gregg* decision that the sentenc-

ing phase of the process is separate and apart from the trial phase and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate.

Appellants further maintain that the Nebraska death penalty statutes constitute cruel and unusual punishment because the standards for establishing aggravating and mitigating circumstances are vague and indefinite.

While one my argue that whenever guidelines are established for a court to use in making decisions, the standards will be in general terms, it appears that the United States Supreme Court, in the *Gregg* case, has approved such guidelines saying, "While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary." *Id.* at 193-95. We have previously approved the standards set out in our statute on aggravating and mitigating standards. See *State v. Rust, supra.*

Appellants next maintain that the statutes authorizing the imposition of the death penalty in a case of this nature, violate the eighth and fourteenth amendments

of the United States Constitution and Neb. Const. art. 1, § 9, because they limit the mitigating factors which may be considered by the sentencing body. We have already and recently disposed of that argument in *State v. Holtan*, 205 Neb. 314, 287 N. W. 2d 671 (1980), when we held that our statute prescribing consideration of aggravating and mitigating circumstances was to be interpreted so as to permit consideration by the court of all aggravating and mitigating circumstances and not just those set forth in the statute, saying specifically: "To the extent that there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating *circumstance* as set forth in section 29-2523." *Id.* at 318-19 (emphasis in original).

Lastly, appellants maintain that the death penalty was improperly imposed in this case because of a misapplication of the aggravating and mitigating circumstances. To the contrary, when this case is compared to the other 32 cases noted by this court in *State v. Williams, supra,* and examined in light of Neb. Rev. Stat. § 29-2523 (Reissue 1979), it clearly speaks in favor of imposing the death penalty. While the author of this opinion has heretofore disagreed with imposing the death penalty in certain of the cases reviewed by this court, finding that they were not sufficiently different from those cases in which the death penalty had not been imposed, the author has no

such difficulty in this case. The appellants' absolute and total disregard for the value of human life as displayed by the evidence in this case makes it separate and different from any other case previously considered by this court. Both Anderson and Hochstein, though they had ample time in which to "cool down" and reflect upon what they were planning to do, proceeded without the slightest regard for the fact that they were taking a human life. Hochstein's willingness to kill another for $1,500 displays how little he valued another's life. The evidence in this case of the careful, deliberate premeditation and malice aforethought makes this type of crime exactly the type contemplated by the "aggravating and mitigating circumstances" standards of our statutes.

For Hochstein and Anderson, the killing of Abboud was a business transaction and a most aggravating circumstance within the meaning of § 29-2523. The death penalty for them is an occupational hazard. If ever a situation exists in which the imposition of a death penalty is appropriate, it is clearly in the case of "killers for hire." A careful review of the entire record in light of both § 29-2523 and the previous decisions of this court discloses that there are no mitigating factors in this case which would justify not imposing the most severe penalty for the most heinous crime—the absolute and willful killing of a human for money. We believe the imposition of the death penalty in this case is amply justified. Having, therefore, found no errors requiring a new trial, we affirm the conviction and the sentence of death imposed.

AFFIRMED.

Clinton and Hastings, JJ., not participating.

APPENDIX B

In the District Court of Douglas County, Nebraska

Docket 99 No. 392

MEMORANDUM and ORDER

THE STATE OF NEBRASKA,

Plaintiff,

vs.

C. MICHAEL ANDERSON,

Defendant.

Docket 99 No. 394

MEMORANDUM and ORDER

THE STATE OF NEBRASKA,

Plaintiff,

vs.

PETER HOCHSTEIN,

Defendant.

This is a most difficult case. On the one hand we have allegations of "Murder most foul". On the other, clear evidence of countless violations of the law, and countless tramplings of the constitutional and statutory rights of these two defendants, as well as the rights of numerous persons who have nothing to do with these particular cases, but whose words and conversations have been illegally intercepted and recorded by a vigilante private detective, licensed by the State of Nebraska, over a period

of several months. The difficult question is whether certain evidence must be suppressed because of such violations.

The body of Ronald Abboud was found on November 2, 1975 in a field west of Omaha. Mr. Abboud had previously been reported missing and last seen on October 29, 1975. The autopsy disclosed that Mr. Abboud had been shot in the head, neck and back. Early in the investigation, suspicion settled on defendants Michael Anderson and Peter Hochstein.

In June of 1976, relatives of the deceased hired Dennis Whelan, a private detective, to investigate the murder of Ronald Abboud. Whelan was told that the Abboud family was interested in establishing the guilt or innocence of Anderson and Hochstein, defendants herein. Whelan was told of two other persons that the family felt might have something to do with the matter—Lon Reams and Mike Becker.

Between June 3 and November 11 of 1976, Whelan gathered information about these persons and one other, Charles Paige, through ordinary means of visual surveillance, interviews and record checking. Whelan testified that this method of investigation led to his conclusions that Anderson and Reams had a business and social relationship and that Hochstein, Anderson and Reams had a social relationship; Hochstein and Paige had a "strong" relationship; and Becker didn't have much of any association with the others.

As of November 11, 1976, Whelan had reached the following conclusions as to Lon Reams and Charles Paige (Transcript of Hearing, p. 119):

"I came to the conclusion that there was a difference of opinion: some felt that Reams was involved; I felt that Reams was involved; another party felt that Reams was not involved, that it was Paige, instead of Reams, that drove the car. We then felt that it was necessary to gain positive proof that these people did, in fact, commit the crime. That's when we installed the wire tap or electronic surveillance. That was phase two."

Whelan further testified (Transcript of hearing, p. 120):

"Q. What information did you have at that time that you felt was reliable?

Mr. Lathrop: At what time?

Mr. Cooper: As of November 11, 1976, the day before the first installation.

A. The information and the things that I was aware of by that time was the association between the individuals, their capability, their opportunity, and those things that went into making up a mode of operation for a crime of this nature. I also put together the thing in a time frame which fit into what was going on. I also had the various locations of the individuals involved. Their activities indicated that they were into other illegal activities, for instance, burglary and those types of things; and that they would be of the nature of being able to commit such a crime. I had a lot of information about the checks, the forgeries—

The Court: (Interposing) Did you have anything other than what the police had?

The Witness: I am not really sure, Your Honor, if I did or not. I don't believe so."

It is obvious then that as of November 11, 1976, Whelan had no evidence against anyone and felt "it was neces-

sary to *gain* positive proof that these people did, in fact, commit the crime." (Emphasis supplied.)

It is also clear that as of that date Whelan knew only what the proper investigating authorities knew. The facts in the case are punctuated as of that date—before that date, perfectly legal activities, and after, primarily totally illegal activities.

Beginning November 12, 1976, Whelan began his illegal investigation. On November 12, Whelan broke and entered into Charles Paige's apartment and installed a room bug. Whelan reentered the apartment to change the power supply on December 1, and the bug went out of operation on December 9, 1976. Whelan testified that he got no useful information from this bug.

On November 15, 1976, Whelan testified he entered defendant Hochstein's apartment and installed a room bug and put a transmitter on Hochstein's telephone. The receiver for this transmitter was located in another apartment leased by Whelan. On December 10-12, 1976, Whelan testified he installed a telephone crossover line in the telephone company junction box, and rigged an extension from the Hochstein telephone to Whelan's rented apartment, where recordings were made of telephone conversations from and to the Hochstein apartment until April 21, 1977. These intercepted conversations between December 12, 1976 and April 21, 1977 were constantly monitored and were retained on nine voice-activated 3600 Ft., 2 track reels and submitted in evidence.

The bugs in the Hochstein apartment were in use from November 15 to November 22, 1976. According to the tes-

timony of Whelan, the room bug transmissions were not recorded and were not of any value.

On November 25, 1976, Whelan removed the front-door lock at Anderson's home and made a master key. On November 29, 1976, Whelan entered the Anderson home and installed two room bugs—one in the bedroom and one in the living room—and one telephone transmitter bug. Whelan re-entered the Anderson home on admittedly 6 occasions to "repair the equipment and install additional power supplies." Whelan testified the bedroom bug "never was operational" and the living room bug went out of operation on November 30; and that the telephone transmitter bug was operational only until December 23, 1976. The receiving equipment for the telephone bug transmitter was said to be in a van parked in the street. Whelan testified that some conversations were recorded, but that the transmission was so poor that he couldn't get much from it. Whelan testified that these telephone conversations were recorded on cassettes that were destroyed.

At a subsequent point in the hearing, Whelan produced a cassette type (Ex. 45) of a conversation between Mrs. Anderson and another party. This cassette, by some strange quirk, seems to be the only cassette saved, and it is of high quality, clear and distinct with every word of that conversation readily audible. No other recordings of the Anderson wire tap are available to the Court.

On April 15, 1977, Whelan met with Sam Cooper, a deputy county attorney, and played some tapes for him. At a later date, Whelan also gave Mr. Cooper a transcript of excerpts from various telephone conversations covering the period from December 29, 1976 to April 18, 1977. Be-

tween April 15 and June 15, 1977, Whelan and Mr. Cooper talked at least 13 times. On June 7 or 8, 1977, Mr. Cooper and the Douglas County Attorney interviewed Lon Reams at the office of the County Attorney. No admissions were made by Reams at this time.

After this conversation, at the suggestion of Mr. Cooper, Whelan talked to Lon Reams for the first time in the evening of June 13, 1977. At this conversation, Reams testified that "he [Whelan] said that he had taped conversations that showed my implication in it, * * *". Later in his testimony, Reams stated that Whelan did not use the phrases "taped conversations", but that Whelan had said that he had tapes or conversations showing Reams' "involvement in this murder."

After this Whelan-Reams conversation on June 13, 1977, Reams went to an attorney and gave a statement to the County Attorney on June 15, 1977.

Applying the law as the Court sees it to this factual situation, we find the following:

1. On November 11, 1976, Whelan knows nothing that the proper authorities do not know.
2. On November 12, 1976, Whelan begins a course of totally illegal electronic surveillance of the two defendants herein, as well as others;
3. On April 15, 1977, Whelan reports to the County Attorney that he has wiretapped Anderson and Hochstein and thinks they are guilty along with Lon Reams.
4. On June 7 or 8, 1977, the Douglas County Attorney interviews Reams and obtains no admissions or statements.

5. On June 13, 1977, at the specific request of the County Attorney, Whelan interviews Reams. He tells Reams that Whelan knows he (Reams) is implicated in the Abboud murder because of tapes or conversations and suggests that he (Reams) should see a lawyer and confess.

6. On June 15, 1977, Reams gives a statement to the County Attorney, implicating the present defendants.

Legally, this all leads to an inescapable conclusion. Aside from the obvious Fourth Amendment considerations, the situation is fully covered by Nebraska statute. Sec. 86-712 provides:

> "No part of the contents of any intercepted wire or oral communication *and no evidence derived therefrom* may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of Chapter 86, article 7." (Emphasis supplied.)

Determination must be made, then, as to what evidence is "derived" from Whelan's illegal operations. Again the way seems clear.

First of all, it is admitted by all that illegal wiretaps, violating Sec. 86-707, are deeply involved in this case. Since Section 86-707 has been violated, Section 86-712 (set out above) comes into play. Defendants are "aggrieved persons" as defined in Section 86-701 (8).

Defendants' evidence presented at the hearing on defendants' Motion to Suppress shows a possible nexus

between the illegal tapes and the State's case. Examination of the evidence shows the name of the witness Reams disclosed in the transcript of intercepted conversations given by Whelan to the deputy Douglas County Attorney.

Under all the cases read by the Court, the burden of going forward shifts to the State and the State must prove, by a preponderance of the evidence (not beyond a reasonable doubt), that the allegedly tainted evidence has an independent source, see

Nardone v. United States, 308 U.S. 338;

United States v. Giordano, 416 U.S. 505;

United States v. Schipani, 289 F. Supp. 43.

The State has not proved that various portions of evidence has an independent source. The State admits the testimony concerning an incident in Cedar Rapids, Iowa, wherein defendant Hochstein allegedly used the name "Jim Parker" springs entirely from intercepted telephone conversations and admits such evidence is inadmissible. The State also, in Brief, concedes it may not use any of the Whelan wiretaps and states it does not intend to use a court-authorized wiretap, and the Court finds that the State could not use such evidence because the court-ordered wiretap is dependent, in part, on evidence illegally obtained by Whelan.

The same ruling must apply to evidence seized under the search warrant, because the warrant also was based on an affidavit containing illegally obtained evidence.

The most difficult area arises in connection with the testimony of Lon Reams. Initially, the Court felt that the actual giving of the statement constituted such a vol-

untary human expression that the "taint" of the illegality would be removed. Examination of the cases shows to the contrary. As most clearly stated in *United States v. Tane,* 329 F. 2d 848:

> "The government next contends that Pase's testimony was not subject to suppression because it was the product of an intervening voluntary act, breaking the necessary nexus between the tap and the testimony. While the proffer of a living witness should not be "mechanically equated with the proffer of inanimate evidentiary objects illegally seized," *Smith v. United States,* 324 F. 2d 879, 881 (D. C. Cir. 1963): *McLindon v. United States,* 117 U. S. App. D. C. —, 329 F. 2d 238 (1964), the government has failed to carry its burden of showing that the information gained from the wiretap did not lead, directly or indirectly, to the discovery of Pase and to Pase's willlingness to testify. See *United States v. Coplon,* 185 F. 2d 629, 636, 28 A. L. R. 2d 1041 (2 Cir. 1950). Indeed, the record demonstrates that the identity of Pase and knowledge of his implication in unlawful payments was derived from the wiretap, and that Pase was unwilling to testify or even admit to making any unlawful payments until he was told by the Assistant District Attorney that the December 6 conversation between his attorney and union officials had been tapped. The road from the tap to the testimony may be long, but it is straight."

See also *Brown v. Illinois,* 422 U. S. 590, and *Wong Sun v. United States,* 371 U. S. 471.

The State has adduced no independent evidence showing that the LON REAMS testimony was reached by actions independent of the illegal wiretaps. The State does *not* have to prove that the Reams testimony was *not* obtained by use of the illegal wiretaps, but the State *must*

prove that the Lon Reams testimony was reached by some means independent of the illegal wiretaps.

No such showing has been made to this Court. Examination by the Court of each page of the hundreds of pages of police reports made before April 15, 1977 (the date Whelan conferred with deputy County Attorney Cooper) showed only three mentions of Lon Reams:

(1) On November 10, 1975, Reams was interviewed by Sgt. J. P. Wintle, as follows:

> "Reporting officer interviewed party REAMS, Lon A. w/M dob 07-27-51 4870 S. 157 St. 895-1185 self-employed Corporate Insurance Consultant works out of his residence. Interview with Lon REAMS concerned a possible threat made by the party ANDERSON, Michael against party ABBOUD. REAMS stated he has known Mike ANDERSON since approximately February 75 during that time he recalled no specific threats or especially bad blood between the parties ANDERSON or ABBOUD. REAMS stated that only on one occasion has he heard party ANDERSON curse ABBOUD in the past but nothing specific.
>
> It should be noted that the party REAMS and the party ANDERSON are close friends as well as business associates.

(2) On May 20, 1976, Sgt. Wintle made the following report:

> "Information received from Investigator Stuart Halpin, NSP indicated he gained it from a confidential informant as follows. HALPIN stated the party Peter HOCHSTEIN, who is employed at the Radio Shack, 30 & Dodge Street, purportedly carries a

> gun under his belt and has stated he knows how to use it and has used it. HALPIN further stated HOCHSTEIN was about to lose his job at the Radio Shack, however he wasn't sure about the date of that. HALPIN further went on stating Lon REAMS who is a friend or business partner of C. Michael ANDERSON has a private plane which he parks at Eppley Airfield. HALPIN apparently has some information indicating the party that did the killing in the ABBOUD homicide had come from the Minneapolis area.
>
> No further information."

(3) On June 29, 1976, Sgt. Dempsey made the following report:

> "On 29jun76 at approximately 1000 hours this officer in the company of NSP Officer Steve KYLES went to Independent Plaza located in the Old Mill Shopping Center in an attempt to contact C. Michael ANDERSON. Officers talked with his partner, Lonnie REAMS and REAMS advised ANDERSON was enroute to the office and would be there shortly. Officers set up a survelliance across the street, waited until approximately 2315 hours when ANDERSON arrived."

Aside from these references, no mention of Reams' name has been found by this Court. It might be noted that as of June 13, 1977, Whelan, in his report to the Abboud family (Exhibit No. 43) wrote, "Talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but knows what happened. We decided that Mila and I should talk with Lon and make a deal."

The Reams testimony can only come from an exploitation of the illegal wiretaps.

Practically all of the cases in this area of the law refer to the problem of the "fruit of the poisonous tree." In this case, considering the pervading illegality injected into the case by Whelan, the disputed evidence might well be considered "the fruit of the poisonous forest." Such evidence must be suppressed.

IT IS THEREFORE ORDERED:

1. That the following evidence is suppressed and may not be used in the trial of this matter:
   (a) The testimony of Charles Paige;
   (b) All testimony concerning the Cedar Rapids incident;
   (c) The Court-authorized wiretap;
   (d) Evidence seized pursuant to the search warrant issued June 15 and 18, 1977;
   (e) The testimony of Lon Reams.
2. The case is set for trial on February 6, 1978 in order to afford the State of Nebraska its right to direct appeal of this ruling to the Nebraska Supreme Court pursuant to the provision of Section 86-705 (12).

Dated this 23rd day of December, 1977.

BY THE COURT:

/s/ John T. Grant
Judge

APPENDIX C

18 U. S. C. § 2511. *Interception and disclosure of wire or oral communications prohibited*

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral

communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

18 U. S. C. § 2515. *Prohibition of use as evidence of intercepted wire or oral communications*

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in

evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this.

APPENDIX D

Neb. Rev. Stat. 1943 § 28-401. *Murder in the first degree, defined; penalty.* Whoever shall purposely and of deliberate premediated malice or in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Correctional Complex during life. The punishment shall be determined and fixed in the manner provided by sections 29-2520 to 29-2524.

Neb. Rev. Stat. 1943 § 29-2519. *Statement of Intent.* The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-401 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Leg-

islature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-401 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

Neb. Rev. Stat. 1943 § 29-2520. *Murder; person found guilty; sentence; determination.* Whenever any person is found guilty of a violation of section 28-401, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) the judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

Neb. Rev. Stat. 1943 § 29-2521. *Determination of sentence; procedure.* In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Neb. Rev. Stat. 1943 § 29-2522. *Sentence; death; life imprisonment; determination of death in writing.* After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Neb. Rev. Stat. 1943 § 29-2523. *Aggravating and mitigating circumstances, defined.* The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity:

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Neb. Rev. Stat. 1943 § 29-2524. *Existing procedures; act does not repeal.* Nothing in sections 24-342, 28-

401, 28-417, and 29-2519 to 29-2546 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Neb. Rev. Stat. 1943 § 29-2525. *Punishment is capital; appeal; clerk of district court; transcript; prepare; file; no charge; Clerk of Supreme Court; writ or error; issue.* In cases when the punishment is capital, no petition in error shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, issue a writ of error. Such writ shall be returnable before the Supreme Court and the payment of a docket fee shall not be required.

Neb. Rev. Stat. 1943 § 29-2528. *Conviction; punishment is capital; writ of error; suspension of execution; hearing.* In all cases of conviction when the punishment shall be capital, the judges or court shall allow such writ of error as a matter of right, and shall order a suspension of the execution until such writ of error shall be heard and determined. Upon hearing such writ of error, it shall order the prisoner to be discharged, a new trial to be had, as the nature of the case may require.

Neb. Rev. Stat. 1943 § 29-2521.01. *Legislative findings.* The Legislature hereby finds that:

(1) Life is the most valuable possession of a human being, and before taking it, the state should

apply and follow the most scrupulous standards of fairness and uniformity;

(2) The death penalty because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Neb. Rev. Stat. 1943 § 29-2521.02. *Criminal homicide cases; review and analysis by Supreme Court; manner.* The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Neb. Rev. Stat. 1943 § 29-2521.03. *Criminal homicide cases; appeal; sentence; Supreme Court review.* The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous

cases involving the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. 1943 § 29-2521.04. *Criminal homicide cases; Supreme Court review and analyze; district court; provide records.* Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. 1943 § 29-2522. *Sentence; death; life imprisonment; determination of death in writing.* After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Neb. Rev. Stat. 1943 § 29-2524. *Existing procedures; act does not repeal.* Nothing in sections 24-342, 28-303, 28-313, 29-2519 to 29-2546 and sections 29-2521.01 to 29-2521.04 shall be in any way deemed to repeal or

limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Neb. Rev. Stat. 1943 § 29-2524.01. *Criminal homicide; report filed by county attorney; contents.* Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

Neb. Rev. Stat. 1943 § 29-2524.02. *State Court Administrator; criminal homicide report; provide forms.* The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

Neb. Rev. Stat. 1943 § 86-712. *Intercepted wire or oral communication; contents; evidence; when.* No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of Chapter 86, article 7.

80-1204, 80-5862

In The

Supreme Court of the United States

October Term, 1980

—o—

No. 80-1204

C. MICHAEL ANDERSON,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

No. 80-5862

PETER HOCHSTEIN,

Petitioner,

vs.

STATE OF NEBRASKA

Respondent.

—o—

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

—o—

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QUESTIONS FOR REVIEW

1. Should the testimony of a live witness be suppressed when the movant has failed to affirmatively show he was obtained as a result of an illegal wiretap?

2. Does the Nebraska death penalty meet United States constitutional requirements?

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80-1204, 80-5862

In The

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vs.

STATE OF NEBRASKA

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

SUMMARY OF ARGUMENT

I.

The Testimony of Witness Reams Was Admissible.

A. The petitioners produced no direct evidence from illegal wiretaps made by private investigator Whelan that was shown to have helped locate witness Reams as a witness for the prosecution or influenced his testimony. The police knew about witness Reams' social and business con-

nections with the petitioners early in the case and before the illegal wiretaps were made by Whelan. When Whelan was hired by the family of the deceased the name of Reams was given to him by the family as a person to investigate.

Whelan was able to influence Reams to testify by promises and bluff unrelated to any actual wiretap reception. Therefore, petitioners have failed to show that this is even a "fruit of the poison tree" case at all; it is, instead, a case of a private investigator, with tenacity, suspicion, and information picked up from various sources, all of which were legal, lucking into a solution of the case.

B. Even if it is assumed that the illegal wiretaps by Whelan gave him some information, which has never been produced, which led him to Reams as a prosecution witness, the balancing tests set forth in *United States v. Ceccolini* lead to the inescapable conclusion that any taint has been attenuated and that Reams, as a live witness, was properly permitted to testify.

II.

The Exclusion of the Juror Was Proper.

The Nebraska death penalty gives the jury no recommendation or influence on the penalty. The penalty is imposed by the court after considering aggravating and mitigating circumstances. *Witherspoon v. Illinois* is therefore inapplicable. Despite the fact that *Witherspoon* is directed to a jury which imposes or recommends the death penalty, the requirements were sufficiently met in this case by the district court who conducted a thorough examination of the juror after she expressed concern about being able to reach a verdict of guilty or not guilty.

III.

Constitutionality of the Nebraska Death Penalty.

The Nebraska Supreme Court has thoroughly examined the Nebraska death penalty in light of recent United States Supreme Court decisions and found it to be constitutionally proper in light of those decisions.

IV.

The Comparative Review of Death Sentences Imposed Under the Nebraska Death Penalty.

The Nebraska Supreme Court has reasonably interpreted the Nebraska statute which required it to make an examination of the sentences imposed in homicide cases and has made a thorough review of such cases. Prior to said requirement being statutory, the Nebraska Supreme Court also made a thorough review of such cases on its own. The petitioners received a meaningful review of their death sentences in this case and in light of previous cases.

———o———

ARGUMENT

I.

The testimony of Lon Reams was admissible at the petitioners' trial.

The main issue in these petitions for certiorari is whether witness Lon Reams' testimony against the petitioners should have been suppressed at trial. The petitioners argue at length that the testimony was "fruit of

the poisoned tree" and should have been suppressed. Their basic contention is that the testimony of Reams was "tainted" by the concededly illegal Whelan wiretaps and should have been excluded as evidence directly derived from the illegal wiretaps. They further assert that the state failed to show an independent source for the testimony of Reams.

This issue was first addressed by Judge Hale McCown of the Nebraska Supreme Court. Prior to trial, the petitioners filed a motion to suppress the testimony of Lon Reams and other evidence. The district court granted the motion to suppress all wiretap related evidence and testimony. The state then exercised its statutory right to appeal that ruling to the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1979). Thereupon, Judge McCown reversed that part of the ruling of the district court suppressing the testimony of Reams and found that such testimony was admissible. We submit, as hereinafter discussed, that Judge McCown's ruling, and the subsequent affirmance of the Supreme Court of Nebraska, were correct.

The principal issue addressed by Judge McCown in an unpublished opinion was whether or not Lon Reams could testify as a witness at the trial of the petitioners. Judge McCown first found that the statutory exclusionary rule, Neb. Rev. Stat. § 86-712 (Reissue 1976), combines "with the judicially imposed exclusionary rule under the Fourth Amendment to pose the problem of whether Lon Reams' testimony as a witness is derived from, or the evidentiary product of, the illegal Whelan wiretaps." Judge McCown then discussed the issue of whether or not the

testimony of a living witness should be suppressed as the evidentiary fruit of the poisoned tree of illegal wiretapping.

After analyzing this issue, Judge McCown concluded in part as follows:

> In the present case the unlawful conduct was the conduct of a private individual and not that of a law enforcement officer. In terms of causation, the activities of the private individual and the activities of the law enforcement officers were independent of each other. The present case does not involve the usual situation in which the name or identity of a witness is obtained only by reason of the unlawful activity. Here the record shows that police officers, in the course of their investigation of the Abboud murder, interviewed Lon Reams on three different occasions between November 10, 1975, and June 29, 1976. The police knew as well as Whelan did that Reams had a social relationship with both Anderson and Hochstein, as well as a business relationship with Anderson. *The evidence fails to demonstrate that the illegal wiretaps revealed any new information about Reams' involvement, but only suspicion supplied by the assumptions, speculation, and conjecture of Whelan.*

(Emphasis added.)

The application of the "attenuation doctrine" to in-court testimony of witnesses located as a result of an illegal search was recently addressed by the United States Supreme Court in *United States v. Ceccolini,* 435 U. S. 268, 55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978). Prior to the *Ceccolini* decision, application of the exclusionary rule to in-court testimony of witnesses was unclear. However, the *Ceccolini* decision clarifies this area of law and provides express standards for the application of the exclu-

sionary rule to live-witness testimony. The *Ceccolini* decision was rendered subsequent to Judge McCown's finding that Reams' testimony was admissible.

As Judge McCown's opinion indicates, prior to the *Ceccolini* decision there was a divergence of opinion as to whether or not a *per se* rule existed that the testimony of a live witness should be allowed at trial no matter how close and proximate the connection between the witness and a violation of the Fourth Amendment. The *Ceccolini* decision rejected a *per se* admissibility rule of such testimony in favor of a balancing test. It is under this balancing test that we must analyze whether witness Reams' testimony was admissible at the defendants' trial.

Justice Rehnquist in *United States v. Ceccolini,* 435 U. S. 268, 55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978), announced several factors which are relevant to the application of the exclusionary rule to live-witness testimony. These factors are summarized below:

(1) The degree of free will exercised by the witness;

(2) Whether the illegally seized evidence was used in questioning the witness;

(3) The amount of time which elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the testimony at trial on the other;

(4) Whether the witness's identity and relationship with the party on trial was known by the police prior to the discovery of the illegally seized evidence;

(5) Whether the illegal activity was entered into by law enforcement officers with the intent to find tangible evidence or to find a willing and knowledgeable witness to testify; and

(6) Whether the application of the exclusionary rule in a particular situation would have any deterrent effect on the behavior of law enforcement officers.

Applying the multifactor attenuation analysis announced by the Court in *Ceccolini* to the facts present in this appeal leads to the inescapable conclusion that Reams' testimony was admissible against the petitioners. However, prior to a discussion of these factors relative to the case at bar, an important point previously made, needs to be re-emphasized. This point is relevant to each factor required to be considered under *Ceccolini.* The avowed purpose of the exclusionary rule, whether statutorily or judicially created, is to deter future unlawful police conduct. As Judge McCown found, in the present case the unlawful conduct was that of a private individual and *not* that of a law enforcement officer. The activities of the private individual and the law enforcement officers were independent of each other. Once again, as Judge McCown so aptly stated, "[t]o apply the exclusionary rule against the State on the record here would misdirect the deterrent effect of the rule."

With the above point constantly in mind, we turn to a discussion of the facts in this case under the principles announced in *Ceccolini.* The first attenuating factor cited in *Ceccolini* concerns the degree of volition exercised by the witness in deciding to testify. The petitioners argue that because of Whelan's involvement in trying to convince Reams to testify that the decision to testify was not an exercise of free will. As in *Ceccolini,* the evidence in this case indicates overwhelmingly that Reams' testimony was in no way coerced or induced by official authority. From the point of view of the state, Reams' decision to

testify was completely voluntary and not coerced by any official government action. This conclusion is supported in *Ceccolini* where the Court stated:

> Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. *The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.*

(Emphasis added.) *Id.* at 276, 277.

From the point of view of the state, the record reveals a number of volitionary acts on the part of Reams: (1) After discussions with Whelan, Reams met with Deputy County Attorney Cooper to discuss the case, at which he denied involvement (122:12)[1]; and (2) later, after consulting his attorney and further discussions with Whelan, he agreed to testify. The totality of the circumstance shows that Reams, after pondering the consequences of his action, voluntarily and with a proffer of immunity (no small matter), agreed to testify. The petitioners argue that Reams was coerced by Whelan into agreeing to testify. However, coercion, if any were applied in the present case, was that of a private individual and not that of the state. Any time a witness comes forward to testify,

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1 References are to state court testimony known in Nebraska as bill of exceptions.

such action may be the result of coercion by parents, spouse, church or other unofficial segments of society; this is not the kind of interference with the exercise of free will the United States Supreme Court had reference to. In fact, the active interest and cooperation of society is absolutely necessary to the operation of government by law.

Even considering Whelan's illegal conduct, there is no connection with the securing of Reams' testimony! Whelan's bluff or lucky shot to Reams' fear or conscience was not illegal; and as Judge McCown aptly observed in his opinion in this case: "Unless an offer of immunity to a known witness by the government constitutes an improper exploitation of any previous illegal activity by a private individual, the actions of the prosecution in this case with respect to Reams were neither illegal nor improper." What was the illegal activity? It was the wiretaps. Whelan testified several times that he got no information on Reams from the wiretaps (207:19; 286:1, 20; 287:2) nor did he reveal any wiretap information to Reams (287:5-8). Contrary to the statements in the petitions indicating that Whelan had taped conversations showing Reams' involvement in the Abboud murder and told Reams so, nothing in the tapes connects anyone—they are worthless as evidence.

The Supreme Court of Nebraska found from the evidence:

> The record establishes the fact that nothing heard during the illegal wiretap led the State to Reams. Exhibit 43 best illustrates this fact. Exhibit 43 is a report made by Whelan to the Abboud family and reads, in part:

"Monday, 6-13-77

"Talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but knows what happened. We decided that Mila and I should talk with Lon and make a deal.

". . . Lon had been at her home all week-end and was acting very nervous, upset over something. Plan decided on: Mila is to talk with Reams this afternoon and tell him of her involvement with me and that the case is coming down with Reams as a conspirator; he will be charged with murder. Also, it is now known that Anderson, Pete and Leo are going to kill Lon. Mila also believed this and was placed in the middle. Both had to make a decision—Reams arrested or Reams killed. Mila agreed to talk with Lon and go for the confession. She agreed to give Lon enough information so that he would believe that he had no out and that Cooper had enough for the arrest."

Of course, none of the "facts" to be related to Reams were true and were not obtained as a result of any illegal wiretap.

We, therefore, conclude that the identity of Reams was made known to the State by independent means and was not the sole result of an illegal wiretap. It was, therefore, not the fruit of a poisonous tree and it was not error for the court to permit Reams' live testimony to be admitted into evidence.

State v. Anderson and Hochstein, 207 Neb. 61, 62, 296 N. W. 2d 440, 448 (1980).

The second attenuating factor discussed in *Ceccolini* is whether the illegal seized evidence was used in questioning the witness. The record indicates that the illegally seized evidence, which was in fact suppressed by both the trial court and Judge McCown, was not used in questioning Reams at trial. The petitioners argue that the illegal

conduct, specifically Whelan's wiretaps, were the primary lever securing Reams' testimony; but Whelan discovered no concrete evidence from the wiretaps. He could have used the same bluff on Reams if he had never made a wiretap. Once again, if there was any exploitation of the illegal evidence, it was that of a private individual, and not that of any law enforcement officer, and that based solely on assumptions and speculation.

A third factor to take into account is the amount of time which elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the testimony at trial, on the other. The petitioners contend that unlike *Ceccolini,* where four months elapsed between the illegality and the decision to testify, the influence of the illegal wiretaps pervaded the entire period between the initial illegality and Reams' decision to testify. This argument ignores the fact, as discussed later, that the police had already interviewed Reams prior to Whelan's activities (E9). In addition, the period of time between Whelan's illegal activities and the witness' testimony at trial was over a year.

A fourth attenuating factor concerns whether the witness' identity and relationship with the petitioners were known to the police before the illegal conduct. The petitioners argue that the police had absolutely no reason prior to the wiretaps to believe Reams was in any way involved in or knew about the Abboud murder. However, the record in this case shows conclusively that police officers, in the course of their investigation, interviewed Reams three different times prior to the illegal conduct (T44). The police knew a few days after the murder that Reams, along

with petitioner Anderson's wife, heard Anderson correctly predict that Abboud was going to be hit in the next two weeks (301:12). This was seven months before Whelan even entered the case. Thus, the police were well aware of Reams and his relationship with the petitioner. The record reflects that the police knew that Reams had a social relationship with both petitioners Anderson and Hochstein, and a business relationship with petitioner Anderson. As Judge McCown stated, ". . . [t]he evidence fails to demonstrate that the illegal wiretaps revealed any new information about Reams' involvement, but only suspicion supplied by the assumptions, speculations, and conjecture of Whelan."

A fifth factor of relevance in gauging attenuation is the purpose and flagrancy of the official misconduct involved. Also see, *Brown v. Illinois*, 422 U. S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975). Related to this factor is the sixth criteria which concerns whether the application of the exclusionary rule would have any deterrent effect to law enforcement officers. The petitioners argue that Whelan specifically and intentionally initiated the wiretaps for the purpose of finding evidence to convict the petitioners. We must emphasize that in the present case we are not dealing with official government misconduct; instead, we are faced with illegal conduct by a private individual in no way sanctioned by the state.

In *Ceccolini* the Court concluded that application of the exclusionary rule could not have the slightest deterrent effect because there was no evidence to suggest that the officer initiated the search with the intent to find tangible evidence of a witness. Similarly, the suppression of

Reams' testimony in this case would have no deterrent effect on the state for the reason that any illegal conduct in this case was that of a private individual. The social cost of permanently silencing Reams would be "too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect." 435 U. S. at 280.

When Whelan was retained by the Abbouds in June of 1976 the name of Lon Reams was given to him as a possible suspect, along with the names of Anderson and Hochstein.

Whelan has testified that he essentially divided his investigation into three phases, the first being a check on the backgrounds of the potential suspects and surveillance on them. It was through this phase that his suspicions began to focus upon Reams as being involved.

Whelan testified at the suppression hearing, referring to the wiretaps, as follows:

Q. Did you obtain any information with respect to Mr. Reams?

A. I don't think so, no.

Q. Did you reveal any of the conversations off that wiretap to Mr. Reams?

A. No, sir.

Q. Did you ever at any time play any of the conversation to Mr. Reams?

A. Never.

Q. And you testified that you implied to Mila and to Lon Reams that he was in danger?

A. I implied that, yes, to Lon and Mila.

Q. In danger from what?

A. In danger from his associates.

Q. Did you have any factual basis for that?

A. No, sir. All I was trying to do was play on his own paranoia at the time. (287:1-15).

Q. (By Mr. Cooper) Where did you get the information that you presented to Lon Reams when you talked to him on the 13th; what was the basis for that?

A. From Mila Jorgensen or Dickman, and following him.

Q. Okay.

A. I can't say from following him. I would have to say that a lot of it was made up. I was bluffing him. What information was true was what I gained from Mila.

Q. Now, you testified that I didn't authorize you to grant immunity to anybody. That is correct, isn't it?

A. That is correct.

Q. But it was also clear from our conversation that that was the intent if Mr. Reams was to come forward, wasn't it?

A. That was what I drew from it.

Q. And that's basically what you told Mr. Reams, wasn't it?

A. I told him that I thought he should get a lawyer and, through the lawyer, make a deal for immunity. (288:3-20).

We respectfully submit that from a legal standpoint the circumstances resulting in Reams becoming a state's witness are no more improper than if he had turned him-

self in as the result of urging after confession with his priest or consultation with his lawyer—which, in fact, occurred.

II.

The District Court's examination and exclusion of a juror during voir dire was proper in all respects.

The petitioners argue that the district court erred in not granting a request for a mistrial based upon the prosecution's "death qualifying" the jury panel. In particular, they assert that a juror was excluded because of conscientious scruples concerning the death penalty and that the constitutionally mandated examination by the district court in conformity with *Witherspoon v. Illinois*, 391 U. S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), was not undertaken.

According to the record, one of the members of the jury panel, during the voir dire examination of the prosecution, stated that she did not believe in capital punishment. She was then asked whether that fact would color her judgment in reaching a verdict of guilty or not guilty. She responded that "[I]t might." The district court then further inquired as to whether or not she felt that way to such a degree that it would affect her deliberations on the question of guilt or innocence. The district court concluded from such examination that it would influence her determination of the factual question of guilt or innocence (Vol. VII, 330:14; 331:11). The district court subsequently denied the petitioners' motion for mistrial on this issue (Vol. VII, 334:6-14).

In *Witherspoon, supra,* the Supreme Court stated that:

> [W]e hold that a sentence of death cannot be carried out if the jury that *imposed or recommended it* was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

(Emphasis added.)

According to *Witherspoon,* unless a venireman, where the jury influences the penalty, is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that may be presented at the trial, he cannot be excluded.

The petitioners' reliance on *Witherspoon* is obviously misplaced. In *Witherspoon,* the jury had two distinct responsibilities: first, to determine whether the accused was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death. Contrarily, in Nebraska, juries have only the first responsibility. Juries have nothing to do with punishment of defendants in the event they find them guilty. Sentencing is specifically reserved for the courts. Neb. Rev. Stat. § 29-2519, et seq. (Reissue 1979).

Despite the fact that *Witherspoon* is factually dissimilar to the case at bar, the district court did in fact satisfy the requirements of *Witherspoon* in excluding the particular juror in this case. According to the record, the district court conducted an examination of the juror after she expressed concern about being able to reach a

verdict of guilty or not guilty. After this examination, the district court concluded that her views on capital punishment would influence her determination of guilt or innocence. The record further reflects that the district court excluded the juror for the reason that she said her personal feeling would affect her judgment on what she should decide (Vol. VII, 334:6-14). A review of the record conclusively establishes that the district court's examination and exclusion of the juror were in full compliance with *Witherspoon.*

III.

The death Penalty in Nebraska does not violate the United States Constitution.

The Nebraska Supreme Court in this case and in prior decisions has made clear that Nebraska's death penalty statutes do not violate the Constitution of the United States. *State v. Stewart,* 197 Neb. 497, 250 N. W. 2d 849 (1977); *State v. Rust,* 197 Neb. 528, 250 N. W. 2d 867 (1977); *State v. Holtan,* 197 Neb. 544, 250 N. W. 2d 876 (1977); *State v. Simants,* 197 Neb. 549, 250 N. W. 2d 881 (1977), vacated on other grounds; *Simants v. State,* 202 Neb. 828, 277 N. W. 2d 217 (1979); *State v. Williams* 205 Neb. 56, 287 N. W. 2d 18 (1979); and *State v. Otey,* 205 Neb. 90, 287 N. W. 2d 36 (1979).

When Neb. Rev. Stat. § 29-2523 (Reissue 1979) is read in its proper context—together with Neb. Rev. Stat. § 29-2521 (Reissue 1979)—the fallacy of petitioners' arguments are evident. Section 29-2521 says the court may consider evidence as to any matter relevant to sentence. Furthermore, the statute says this evidence "shall in-

clude" matters relating to the aggravating and mitigating factors listed in section 29-2523. With regard to the presentation and receipt of evidence at sentencing proceedings, this is the only mandatory language to be found in section 29-2521. In other words, the court is required to include in its sentencing deliberations consideration of evidence relating to the aggravating and mitigating circumstances enumerated in section 29-2523. Nowhere in the sentencing provisions is there any indication that the sentencing court must disregard factors which are not found in the section 29-2523 (2) listing. In fact, the language of the statutes reveal the opposite legisative intent. The sentencer is *not* directed to consider section 29-2523 factors to the exclusion of all other circumstances. Rather, the court is directed by section 29-2521 to consider any matter relevant to sentence, and to receive any evidence of probative value.

Second, the petitioners' argument is contrary to the interpretation of the sentencing statutes adopted by this court in *State v. Holtan,* 205 Neb. 314, 287 N. W. 2d 761 (1980). In *Holtan* this court was presented with an argument almost identical to the one advanced here. The court observed:

> Defendant claims that section 29-2523 is in violation of the United States Constitution in that it does not permit the court to consider all matters relevant to mitigation as required by both the Lockett and Bell decisions. In this respect, we believe the defendant reads the statute incorrectly. The statute, section 29-2523, sets out specific aggravating and mitigating circumstances. The trial court was correct in concluding that the matter concerning the aiding of the prisoner did not specifically fall within one of the

mitigating circumstances. Nevertheless, section 29-2521, R. R. S. 1943, specifically provides that in the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence. The statute further provides, "Any such evidence which the court deems to have probative value may be received." All the sections must be read together. In this case the evidence sought to be introduced by the defendant was received. The court did consider the evidence even though it was not a mitigating circumstance within the meaning of the statute. It concluded that the offered fact was not of such weight as to cause the court to refrain from imposing the death sentence.

The United States Supreme Court in Lockett v. Ohio, *supra,* said: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be *precluded* from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis supplied.) Nothing in our statute precludes the court from considering *all* aspects of the defendant's character. To the extent there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating *circumstance* as set forth in section 29-2523.

Id. at 317-319, 287 N. W. 2d at 674.

The petitioners' argument on this point is contrary to both the plain language of the statutes in question and the decided cases. The assertion that Nebraska's

death penalty statutes limit the mitigating circumstances which may be considered is without merit and should be rejected.

IV.

The comparative review of death sentences implemented by the Nebraska Supreme Court pursuant to its own policies and to LB 711, Laws 1978, Sections 29-2521.01 through 29-2521.04, 29-2522 (3) (Supp. 1978), complies with all provisions of the Federal and State Constitutions.

LB 711 was enacted by the 1978 Nebraska Legislature in an effort to assure that the death penalty never be imposed arbitrarily or disproportionately. In this legislation, now codified as Neb. Rev. Stat. §§ 29-2521.01 through 29-2521.04, 29-2522(3) (Reissue 1979), the Unicameral sought to impose guidelines for the court's review of homicide cases involving the death penalty. The petitioners argue that the provisions of LB 711 are so vague and indefinite as to amount to a violation of due process, the right to counsel, and the prohibition of cruel and unusual punishment.

In *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18 (1979), the proper construction and application of LB 711 was specifically addressed and decided by the court. First, the court held:

> In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable

> only in a case where a sentence of death has been imposed.

Id. at 74-75, 287 N. W. 2d at 28.

The holding in *Williams* provides the definition of those cases to which the special sentence review provisions apply. Pursuant to that definition, the court has identified those cases which are included in the comparative review pool. *Id.* at 77-78, 287 N. W. 2d at 29 (Addendum to the court's opinion.) The material pertinent to the comparative review—particularly the aggravating and mitigating circumstances in each case—can be found in the reported opinions cited in the Addendum to the *Williams* opinion. Thus, the petitioners' assertion that the information necessary to carry out a meaningful comparative review is unavailable is clearly incorrect. Second, petitioners' assertion that an attorney can only guess at the actual application of the law to his client has no validity in light of the construction given LB 711 in *Williams*.

Finally, regardless of the petitioners' assertions concerning LB 711, their contention that there are constitutional defects in the court's review of death penalty cases is meritless. Long before enactment of LB 711, the court had implemented its own policy of comparative review in capital cases. That policy clearly satisfies the requirement of "meaningful appellate review . . . to assure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia,* 428 U. S 153, 195, 49 L. Ed. 2d 859 887, 96 S. Ct. 2909, 2935 (1976). The court's review complied with *Gregg* even before LB 711. Thus, in *State v. Simants,* 197 Neb. 549, 250 N. W. 2d 881 (1977), it was said:

> The Supreme Court has indicated in its opinions that meaningful appellate review may be required to insure that the death penalty is not applied in an arbitrary or capricious manner. . . . [T]his court, in every case under the new statute, will perform its function of death sentence review with a maximum of rationality and consistency. . . . [E]very capital case where there can be the slightest question will be considered in comparison with other capital cases. In other words, we will compare each capital case under review with those previous cases in which the death penalty has or has not been imposed under the new statute. By this means review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

Id. at 563-564, 250 N. W. 2d at 890.

Similarly, in *State v. Stewart,* 197 Neb. 497, 250 N. W. 2d 849 (1977), the court approvingly quoted the following language from the Supreme Court of Florida which, in *State v. Dixon,* 283 So. 2d 1 (Fla. 1973), was interpreting that state's death penalty provisions which are very similar to Nebraska's statutes.

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

197 Neb. at 518, 250 N. W. 2d at 862.

The petitioners received meaningful review of their death sentence. Their contentions to the contrary or to the effect

that the standards of that review are vague and uncertain are unsound.

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CONCLUSION

For the reasons set forth, respondent respectfully prays that the writs of certiorari be denied.

Respectfully submitted,

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